The making of world society through private commercial law: the case of the UNIDROIT Principles

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Since the 1980s, a growing amount of literature has paid attention to multiple structures of governance that transcend the binding borders of national jurisdictions and international agreements.[1] The underlying thesis of these analyses is that new forms of self-regulation and self-legitimization have arisen in the interplay of international, intergovernmental, and non-governmental organizations, transnational firms, regulating agencies, corporate actors, private associations, and institutional networks. One of these fields is the so-called *lex mercatoria*[2] or merchant law.[3] By means of sets of guiding principles, rules of law, and

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[1] As a sample of the main publications on this topic, see Stephen Krasner (ed), *International Regimes* (Cornell University Press 1983); Thomas Risse-Kappen (ed), *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions* (Cambridge University Press 1995); Claire Cutler, *Private Power and Global Authority* (Cambridge University Press 2003); Anne Marie Slaughter, *A New World Order* (Princeton University Press 2004); Helmut Willke, *Global Governance* (Transcript 2006); Christian Tietje and Alan Brouder (eds), *Handbook of Transnational Governance Regimes* (Martinus Nijhoff 2009); Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press 2009); Rafael Domingo, *The New Global Law* (Cambridge University Press 2010); Thomas Hale and David Held (eds), *Transnational Governance. Institutions and Innovations* (Polity Press 2011); Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

[2] See Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' (1985) 34 International and Comparative Law Quarterly 747; Francesco Galgano, 'The New Lex Mercatoria' (1995) 2 Annual Survey of International and Comparative Law 99; Iwan Davies, 'The New Lex Mercartoria: International Interests in Mobile Equipment' (2003) 52 International and Comparative Law Quarterly 151; Ralf Michaels, 'The True Lex Mercatoria: Law beyond the State' (2007) 14 Indiana Journal of Global Legal Studies 447; Helen Hartnell, 'Living La Vida Lex Mercatoria' (2007) 12 Uniform Law Review 733; Nikitas Hatzimihail, 'The Many Lives—and Faces—of Lex Mercatoria: History as Genealogy in International Business Law' (2008) 71 Law and Contemporary Problems 169.

[3] Albert Thomas Carter, 'The Early History of the Law Merchant in England' (1901) 17 Law Quarterly Review 232; Thomas Scrutton, 'General Survey of the History of the Law Merchant'

optional codifications, the *lex mercatoria* offers a flexible normative and procedural framework in which private economic agents may autonomously deal with contractual matters in international commercial practices and look for possibilities of harmonization with domestic jurisdictions at the same time.

Although the application of the *lex mercatoria* in the legal practice is a rather unusual phenomenon, its analytical significance has expanded beyond the limits of private commercial law.[4] Theoretical sociologists, for example, stress the consequences of these kind of practices for the operation of functional systems;[5] sociologists of law emphasize the self-constitutional effect of transnational commercial practices;[6] legal theorists discuss the binding character and sources of soft norms when compared to the hard law of the nation-state;[7] and political philosophers ask for the democratic deficits of transnational law in general and the *lex mercatoria* in particular.[8] Even though their evaluations are far from being a unified and systematic analytical corpus, they all concede that practices such as those included in the *lex mercatoria* are—for better or for worse—a crucial matter in defining the profile of the modern globalized world.

Taking the Principles of International Commercial Contracts (PICC) of the International Institute for the Unification of Private Law (UNIDROIT) as a case study of the *lex mercatoria*, the aim of this article is to assess the contribution of the Principles to the formation of a transnational commercial field in modern world society.[9] Theoretically, world society means that in every action and communication 'the world' is included as a horizon of accessible possibilities.[10]

in Various Authors, *Select Essays in Anglo-American Legal History,* vol. 3 (Little Brown and Company 1909) 7; Clive Schmitthoff, 'International Business Law: A New Law Merchant' (1961) 2 Current Law and Social Problems 129; Aleksander Goldstajn, 'The New Law Merchant' (1981) 12 Journal of Business Law 17; Leon Trakman, *The Law Merchant: The Evolution of Commercial Law* (Fred B Rothman and Company 1983); William Mitchell, *An Essay in the Early History of the Law Merchant* (Cambridge University Press 2009).

[4] See Felix Dasser, 'Mouse or Monster? Some Facts and Figures on the Lex Mercatoria' in Reihard Zimmermann (ed), *Globalisierung und Entsaatlichung des Rechts,* vol. 2 (Mohr Siebeck 2008) 129.

[5] See Rudolf Stichweh, *Die Weltgesellschaft* (Suhrkamp 2000); Mathias Albert and Lena Hilkermeier (eds), *Observing International Relations* (Routledge 2004); Mathias Albert and Rudolf Stichweh (eds), *Weltstaat und Weltstaatlichkeit* (VS Verlag 2007); Helmut Willke, *Smart Governance* (Campus 2007).

[6] On this topic, see Poul Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective* (Hart Publishing 2011); Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen* (Suhrkamp 2006).

[7] See Kenneth Abbot and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421; Anna Di Robilant, 'Genealogies of Soft Law' (2006) 54 American Journal of Comparative Law 499; Jaye Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law' (2012) 25 Leiden Journal of International Law 313; Matthias Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law' (2012) 25 Leiden Journal of International Law 335.

[8] Jürgen Habermas, *Zeit der Übergänge* (Suhrkamp 2001); Ottfried Höffe, *Wirtschaftsbürger, Staatsbürger, Weltbürger: Politische Ethik im Zeitalter der Globalisierung* (CH Beck Verlag 2004).

[9] International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational 2010) [PICC].

[10] Niklas Luhmann, 'Die Weltgesellschaft' in *Soziologische Aufklärung,* vol. 2 (VS Verlag 2005) 63.

For that to be possible, world society should not be restricted to interstate relations (international relations). Instead, it should focus on the operations of transversal social fields such as systems, organizations, networks, interactions, and their reciprocal interdependencies. As long as the PICC are a synthesis of normative expectations arising from delocalized and denationalized commercial operations (practices, customs, patterns), they incorporate the possibility of accessing 'the world of commerce' by means of an increasingly extended applicability of their provisions, regardless of the geographical, national, or cultural differences of the parties to the contract and the topics with which they deal.

To this extent—and these are our hypotheses—if the PICC actually refer to (delocalized) operations in commercial matters: (i) they should not be restricted to just one or a few regions of the world, but they must effectively prove a globalizing effect by showing regional and temporal variations that correlate with historical developments in those world regions; (ii) as a legal instrument in the field of commerce, the PICC relate interests coming from different fields, namely their influence as a normative expectation should connect commerce to other social fields; and (iii)—probably the most significant trait—they should in fact function as a legal instrument protecting normative expectations in arbitral and national tribunals. In other words, the PICC must reflect the variations of world society, on the one hand, and also be potentially universal, on the other.

Consequently, in order to address our hypothesis, we begin by historically situating the PICC and drawing a difference between international and world society. After a brief methodological note, we continue by analysing the geographical extension of the application of the PICC in order to test the hypothesis of their globalizing effects. Complementarily, we move to the evaluation of the relationship of the PICC with the operation of functional systems, aiming to assess the links of the Principles towards other social fields, on the one hand, and towards the internal differentiation of the economy, on the other. By reviewing data on the acceptance of awards and sentences and the analysis of the most invoked PICC in contractual controversies, we shall discuss the functioning of the Principles as a legal instrument aiming to protect normative expectations. Finally, we conclude with an overview of our results and the contribution of the PICC to the building of world society.

I. PICC as a symbol of world society

The PICC were first published in 1994 (with new provisions in 2004 and 2010) by UNIDROIT as a project for the harmonization of international commercial law. The explicit aim of the Principles was to distinguish them from the binding legislation of the international system of States (international conventions) and to draw on commercial practices such as model clauses and contracts, guiding principles, and alternative codifications that might be useful for judges, arbitrators, lawyers, and contracting parties in a non-binding (but self-binding) manner.[11]

[11] PICC (n 9).

The factual distinction between conventions and the condensation of practices, customs, and normative expectations comprehended in the PICC reflects, at a theoretical level, an important difference for our purposes, namely the difference between international society and world society. International society means a society of States, where they are the irreducible elements of action and, therefore, the last instance in deciding what international law is and what it ought to be, and where political decision prevails not only in legislative matters but also regarding compliance with international law.[12] To this extent, international society is a political observation of the world according to which the (only) relevant players of international law are States acting through conventions, treaties, international organizations, and political agreements.

On the contrary, the concept of world society refers to a transversal comprehension of a multi-layered social world in which social systems, organizations, condensed and extended social networks, and diverse contexts of interaction produce both a centrifugal dynamic of self-regulation and strong patterns of interdependence, which transcend the borders of the nation-state and transform them into just another (segmentary) actor with which cooperation and conflict are both possible.[13] Consequently, world society becomes a more inclusive and even dynamic concept as an international society. Whereas international society finally reduces explanations to power relations between States or blocs, world society observes the continuous interplay of power, law, money, scientific truth, influence, value commitments, and even religious beliefs emerging in different social interactions and communications of multiple actors, national and transnational organizations, dense or loosely coupled networks, and functional systems. Social problems are not *a priori* related to politics, though politics (and certainly State politics) may always play a role in defining the structure and dynamics of those social constellations.

In this sense, it becomes clear that conventions are a product of not always converging national interests at an international level, which normally leads to the development of instruments with significant *lacunae* in central topics such as State control over import/export, property rights, and contract validity.[14] The problems resulting from this convergence are threefold: (i) in order to supplement such gaps, non-unified domestic law is introduced to resolve disputes, thus creating new collisions as a consequence of the search for harmonization; (ii) conventions do not adapt easily to changes in the relevant environment, but their

[12] Hedley Bull, *The Anarchical Society* (Palgrave 1977); Barbara Roberson (ed), *International Society and the Development of International Relations Theory* (Pinter 1998); Barry Buzan, *From International to World Society?* (Cambridge University Press 2004); Alex Bellamy (ed), *International Society and Its Critics* (Oxford University Press 2005).

[13] Stichweh (n 5); Luhmann (n 10); Niklas Luhmann 'Globalization or World Society: How to Conceive of Modern Society?' (1997) 7 International Review of Sociology 67.

[14] See Michael Bonell, 'International Uniform Law in Practice: Or Where the Real Trouble Begins' (1990) 38 American Journal of Comparative Law 865. Michael Bonell, 'Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts' (1992) 40 American Journal of Comparative Law 617; Michael Bonell, *An International Restatement of Contract Law* (Transnational Publishers 2005).

primarily political nature make them dependent on always delayed political decisions that are hardly compatible with the acceleration of commercial issues; and (iii) the scope of such conventions is normally restricted to a particular kind of transaction (sale of goods) and do not represent the increasing complexity of economic interchanges. Acting at a world society level in commercial matters, the PICC aim to overcome these restrictions by not only amplifying the range of applicability but also mainly de-provincializing international law through a restatement of contract law and by selecting the most qualitatively proper rule for cross-border transactions (better rule approach) instead of choosing them under the quantitative criterion of their use in a majority of countries (common core approach).[15]

From a legal point of view, this process does not mean incompatibility of the PICC with international conventions but, rather, the opposite. Although conventions such as the UN Convention on Contracts for the International Sale of Goods (CISG) respond to an understanding of the modern world as an international society, while the PICC express this comprehension in terms of a world society in the field of commerce, the latter complements the former 'as a means of interpreting or supplementing the CISG [and] apply to matters outside the scope of the CISG and which otherwise would fall within the sphere of the applicable domestic law'.[16] Sociologically, this difference between international and world society is entirely relevant not only because of the singular concepts of society behind these two ways of producing international and a-national law but also because—as this article hypothesizes—the PICC contribute to the making of world society from the field of private commercial law.

II. Methodological note

Most of the following analyses are constructed upon the UNILEX database[17] and sociological observations of legal processes in different world regions. The UNILEX database consists of abstracts (and full texts when available) of worldwide reported cases in which the PICC are mentioned or explicitly applied. The time period considered for the analysis extends from 1994 (the year of official promulgation of PICC) to 2011. The last actualization of the working database was on 6 February 2013. The number of valid cases amounts to 282, though for different variables there are uneven amounts of missing data (valid data are indicated in each graphic).

The reported character of the database and the restricted number of cases limit its statistical representativeness. However, as the UNILEX official site itself

[15] Michael Bonell, 'The CISG and the Unidroit Principles of International Commercial Contracts: Two Complementary Instruments' (2008–09) 10 International Law Review of Wuhan University 100.

[16] Ibid 117. UN Convention on Contracts for the International Sale of Goods, 19 ILM 668 (1980) [CISG].

[17] UNILEX database <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=14311> accessed 10 July 2013.

announces, arbitral awards are mostly confidential, and the number of decisions containing references to the PICC is far greater than represented in the database. Although no statistical generalizations are possible, available data can be interpreted in the framework of theoretical analyses and sociological observations of UNIDROIT-related events and processes in different regions of world society. To this extent, we aim to make sociologically plausible the contribution of the PICC to the construction of world society in commercial affairs and not to statistically prove their expansion or relevance. As a result of the restricted nature of empirical data, they supplement theoretical assumptions in this case.

III. The fragmentation of international law and the globalizing effect of the PICC

When observed from above, international law has always been fragmented. The political delimitation of a State as a unity of centralized power, the consideration of States as equals (in principle) in the international arena, and, most importantly, the State association of political power and the legal system that gives rise to their own jurisdictions explain this constitutively immanent fragmentation. Conflict-of-law rules reinforce the State dependence of international law by reducing the collision of norms to decisions on the applicability of domestic norms. Alternatively, conventions and treaties are a function of political will rather than an autonomous social space of legal interaction. Fragmentation is not a new issue in international legal relations. In fact, a multicentric approach to law in the form of legal pluralism was the only possible way for early modern empires to avoid exhaustive and expensive control over vast colonial territories.[18]

Where then lies the problem with the modern fragmentation of law if it is not a new feature in legal affairs? The classic legal pluralism is based on a segmentary (territorial, geographical) differentiation of legal jurisdictions, while modern legal pluralism stems from the process of functional differentiation of world society. Systems, organizations, networks, and contexts of interaction are some of the main drivers of functional differentiation.[19] In their continuous interaction and recursive forms of communication, they create self-guiding procedures and norms, which constitute social domains that transcend the borders of politically defined national jurisdictions. In this regard, globalization means a disembedding 'of social relations from local contexts of interaction and their restructuring

[18] See Lauren Benton, *Law and Colonial Cultures* (Cambridge University Press 2005). Even recent investigations of the Roman Empire show that a mixed system of Roman and local law prevailed as a form of legal pluralism and *ius commune* in the peripheral territories of the empire. See Kaius Tuori, 'Legal Pluralism and the Roman Empires' in John Cairns and Paul du Pleiss (eds), *Beyond Dogmatics. Law and Society in the Roman World* (Edinburgh University Press 2007) 39.

[19] See Stichweh (n 5); Rudolf Stichweh, 'On the Genesis of World Society: Innovations and Mechanisms' (2004) 3 Working Papers Institut für Weltgesellschaft <http://www.uni-bielefeld.de/%28en%29/soz/iw/publikationen/workingpapers.html> accessed 31 January 2013; Rudolf Stichweh, 'Das Konzept der Weltgesellschaft: Genese und Strukturbildung eines globales Gesellschaftssystems' (2009) 1 Workingpapers des Soziologischen Seminars 01/09 <http://www.unilu.ch/deu/working-papers-soziologisches-seminar_589906.html> accessed 31 January 2013.

across indefinite spans of time-space'.[20] Disembedded social relations do not belong to one State or another or to one region or one local community. Rather, they are practices and operations that transcend segmentary differentiations and belong to world society itself. World society is, in this sense, an emerging consequence of globalization. It does not arise from a sheer ecological contact among present persons, and it is not an economically and politically coined geographical division of the world between centre and periphery. Rather, it is the gradually expansive emergence of structural foundations (of both operative and normative nature) across different social spaces and places that process communications and interactions from abroad.

To this extent, neither world society nor globalization means a factual, social, and temporal unification of the world. On the contrary, when functional differentiation underlies these processes, there is no possible unification of procedures and norms of different systems, organizations, networks, and contexts of interaction, for autonomy and self-reproduction prevail in each field. Procedures and norms become mutually dependent, and, inside each level, they reproduce a pattern of creative differentiation—for instance, in the field of international contract law, there are the different norms and procedures of the United Nations Commission on International Trade Law and the PICC. This is precisely what makes it difficult to think of the nation-state as a self-contained, completely sovereign legal entity either in international relations or even in internal affairs. Functional differentiation and its normative instruments run transversally to segmentary differentiation of states, and they do not take into account political references as primary motivation for decisions and actions—though states are certainly the institutional form of organization of the political world system and still have much to say when it comes to international agreements that may constrain or promote the activity and outcomes of other social systems.[21]

The PICC represent just one of those multiple normative instruments that today exist in modern world society acting transversally to the segmentary differentiation of the nation-state.[22] Pursuant to the reported cases, courts in 24 states and four transnational tribunals (the Court of Justice of the European Communities, the Economic Court of the Commonwealth of Independent States, the International Centre for the Settlement of Investment Disputes, the United Nations Compensation Commission) have applied the Principles. Figure 1 displays the number of cases in which the PICC have been cited since their promulgation in

[20] Anthony Giddens, *The Consequences of Modernity* (Polity Press 1990) 21.

[21] On the other hand, some other variants of segmentary differentiation are still relevant (in terms of classical legal pluralism) in political and legal matters—as in the case of indigenous people demanding autonomy inside the territory of nation-states. See Luis Rodríguez, *Indigenous Peoples, Postcolonialism, and International Law* (Oxford University Press 2005).

[22] Among others, we can mention the classical Charter of Human Rights, the Charter of Fundamental Rights of the European Union, as well as the Internet Corporation for Assigned Names and Numbers's Domain Name Dispute Resolution Policies in Internet affairs, the Fédération Internationale de Football Association Statutes in world football, the Basel Accords in the financial system, and the Bologna Accords in higher education.

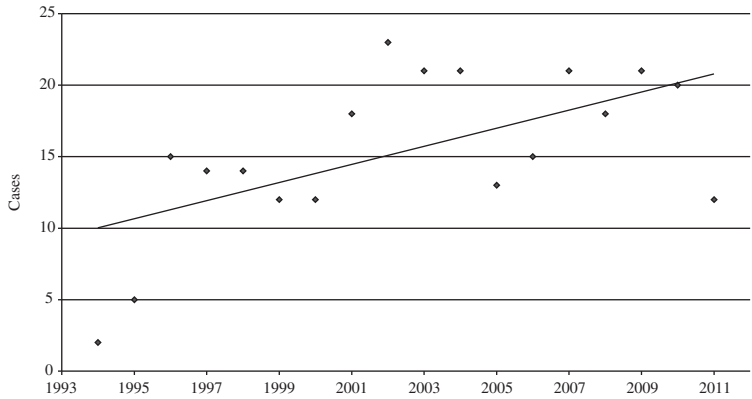

Figure 1. Number of UNIDROIT cases, 1994–2011 (N = 277)

1994. Despite the oscillating application of the Principles, the linear tendency increases.[23] As stated earlier, because of the selectively reported nature of the database, nothing can be said about the statistical significance of this tendency, considering the unknown total number of cases using the PICC worldwide. Yet the application of the Principles in different regions and tribunals shows that they have begun to fulfil a certain role, probably a supplementary role in transnational commercial conflicts. Alternatively, and beyond methodological considerations, the rather narrow number of cases shows also the limitations in the application of the PICC, which is mostly related to reactive attitudes from national jurisdictions, particularly beyond the European region (see discussion later in this article).

Certainly, the Western European region—as seen in Figure 2—comprise a large number of cases (47.9 per cent), Eastern Europe (including Russia) amounts to 17.4 per cent, the Asian region (including Australia and New Zealand) to 13.1 per cent, Latin America to 8.1 per cent, North America to 8.5 per cent (including USA, Canada, Bermuda, Antilles, and Anguilla), the Middle East to 3.1 per cent, and Africa to 1.9 per cent with only five cases.[24] Figure 3 illustrates the domestic, intra-regional, or inter-regional character of the controversies invoking the PICC.[25] Figure 4 compares regions of world society in terms of the level of regionality of controversies, and Figure 5 compares the inter-regionality of controversies containing the PICC.

As Figure 2 displays, with the exceptions of Africa/Middle East and North America—which presents a few cases without temporal variation—in four of

[23] The number of cases decreases in 2011 and descend to a minimum in 2012. This can be explained because of the gradually reported nature of the database. The last years shall tend to normalize after a period.

[24] The variable 'regions of world society' is constructed by nationality of claimant. Regions are Asia (including New Zealand and Australia), Africa/Middle East, Eastern Europe (including Russia), Latin America, North America (USA and Canada), and Western Europe.

[25] The variable was constructed by crossing nationality of the claimant and nationality of the respondent. The same applies to Figures 4 and 5.

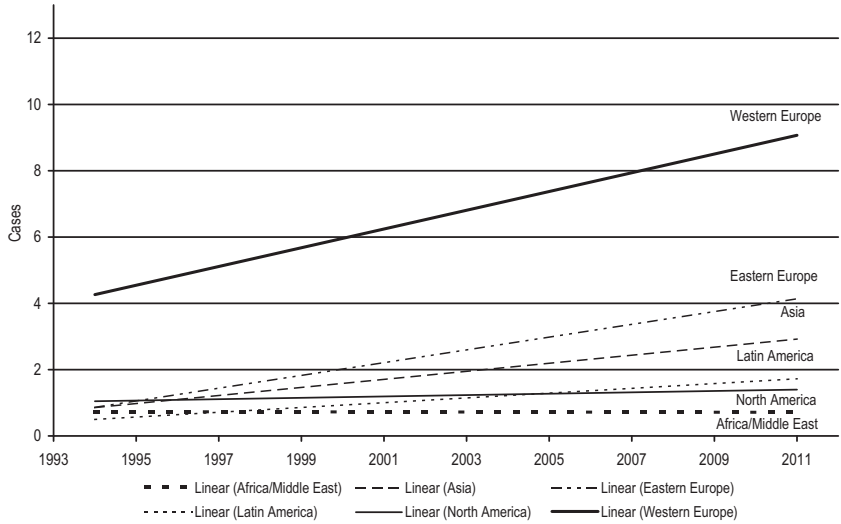

Figure 2. Evolution of UNIDROIT cases by regions of world society (Claimant, N = 254)

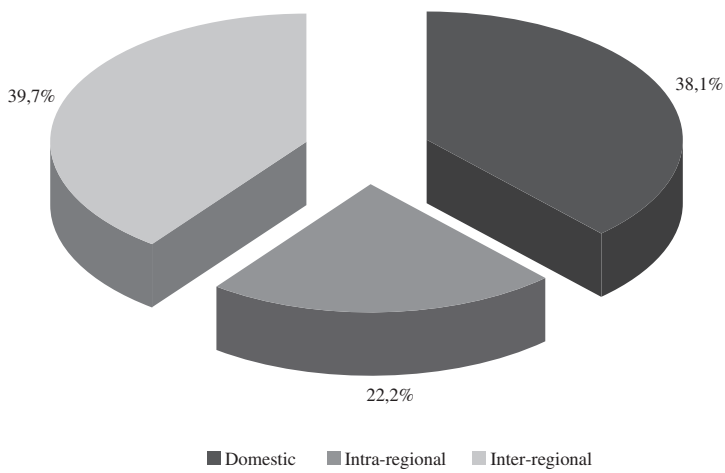

Figure 3. Domestic, intra-regional, and inter-regional character of controversies with PICC (%, N = 257)

the six constructed regions of world society, the cases where the PICC have been invoked show an increasing tendency. Furthermore, as shown in Figure 3, the Principles are being included even in domestic cases (38.1 per cent), although the highest number of controversies invoking them takes place at an inter-regional global level (39.7 per cent). Figure 4 specifies the information in Figure 3. As seen, Western and Eastern Europe have a similar and rather equilibrated distribution of domestic, intra-regional, and inter-regional cases, and Asia and Latin America

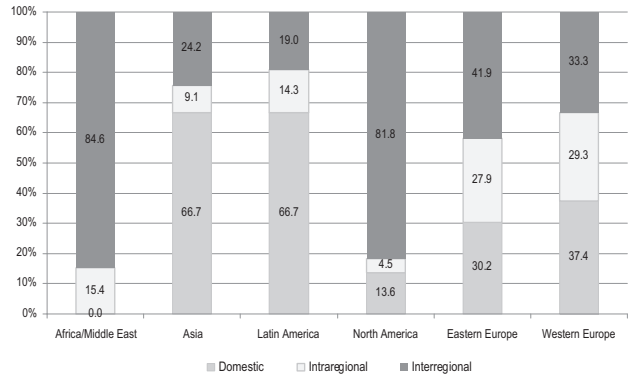

Figure 4. Domestic, intra-regional, and inter-regional controversies by regions of world society (%, N = 255)

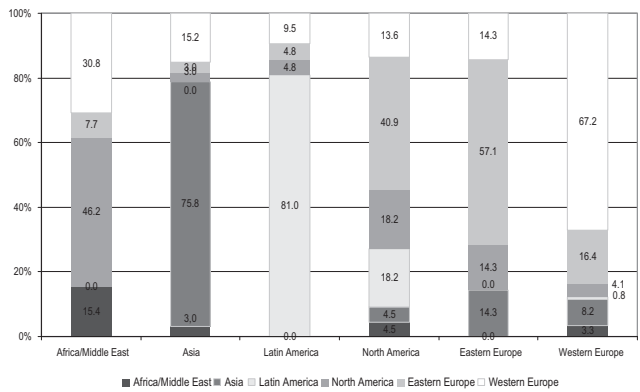

Figure 5. Inter-regionality of controversies containing the PICC (%, N = 253)

build another pattern that concentrates the references to the PICC in cases involving nationals of the same countries (66.7 per cent in each one).

All of this information shows that the PICC are gradually emerging as a legal institution in transnational commercial disputes. Figure 5 displays the inter-regionality (and intra-regionality) of controversies containing references to the PICC when observed by regions of world society. Each region is crossed with ever other region (and with itself) in order to establish the different levels of controversies among and inside them. Western and Eastern Europe are the most active regions in invoking the PICC in their intra-regional and mutual (inter-regional) controversies. Alternatively, only Western Europe and North America have recurred to the Principles in controversies with every other region, although the number of cases in North America invoking the PICC (22) is clearly lower than in Western Europe (122). The cases of Asia and Latin America are predominantly intra-regional (rather than domestic, as shown in Figure 4).

Inter-regionally, Latin America and Asia show controversies invoking the PICC mainly with the Western European region (9.5 per cent and 15.2 per cent respectively). Finally, the region of Africa/Middle East reveals the most limited intra-regional and inter-regional penetration of the PICC (only 13 cases in total, from which six are from the North American region).

Although the PICC are mostly invoked and referred to in the Western European region (and in Europe, in general terms), they are certainly not unknown in other regions of world society. Obviously, this does not mean that the PICC are structurally and normatively already globalized, as becomes evident in the low penetration of the Principles in North America, Latin America, and Africa/Middle East. Beyond the available data, this trend can be sociologically explained. For the case of North America (particularly USA), Peter Fitzgerald has argued, on the basis of empirical research, that instruments such as the CISG and the PICC 'are being ignored because of outright ignorance or because these instruments are simply unfamiliar and perceived . . . as "foreign" law',[26] although the CISG is a ratified treaty (therefore part of contract law in the USA) and the PICC function as a non-binding complementary normative instrument (international restatement of contract law) similar to the American Law Institute's Restatement of the Law Contracts.[27] In the case of Latin America, a positivist legal tradition prevails that rejects party autonomy to select the law governing the contract and makes the choice of law and the performance dependent on the place of contract,[28] which is quite the contrary for the comprehension of globalization as a time-space disembedding. Consequently, when it comes to harmonization efforts, regional projects such as the Inter-American Specialized Conferences on Private International Law are preferred to global instruments such as the PICC.[29]

On the other hand, semantic problems arise when contracts should be performed in world zones where development and under-development coexist. As Hernany Veytia argues, 'what in developed countries and in the big cities of emergent countries is called "good faith", it is not always the same in all latitudes'.[30] In these cases, one should count on different conditions for the concretization of universal principles and their confrontation with local particularisms based on favours, kinship, or community bonds. In other words, good faith and fair dealing—two of the most important principles in UNIDROIT's provisions—depend on the fact that structural and historical conditions do not make other alternative behavioural patterns more attractive. Something similar happens in the case of Africa, where a large informal sector reduces transactions to cash

[26] Peter Fitzgerald, 'The International Contracting Practices Survey Project' (2008) 27 Journal of Law and Commerce 1, 34.

[27] Restatement (Third) of Foreign Relations (American Law Institute 1987).

[28] Geneviève Saumier, 'Designating the Unidroit Principles in International Dispute Resolution' (2012) 17 Uniform Law Review 533.

[29] Carlos Vázquez, 'Regionalism versus Globalism: A View from the Americas' (2003) 8 Uniform Law Review 63.

[30] Hernany Veytia, 'Back to the Future: Los principios Unidroit 3' (2007) 2 Lima Arbitration 126, 133–4.

payments.[31] Everything begins and ends in a non-temporal single event with no future. This process hinders the development of credit and contracts and impedes an extended conception of time in which trust plays a central role in securing the fulfilment of economic commitments.[32] Under such structural conditions, business does not become a system. Finally, in the case of the Middle East, it is probably the existence of a functional equivalent to the *lex mercatoria* that explains the low penetration of the PICC in the region. As Kilian Bälz argues:

> Islamic finance has formulated general principles and standards, whose claim to validity is not dependent on the support of any national legal order . . . In contrast to the lex mercatoria's universalist claim, the law of Islamic finance does not represent a step towards unifying law on a global level, in contrast, introduces new, culture-based divergences into international commercial relations.[33]

Nonetheless, in all of these regions with a low penetration of the PICC, new efforts towards harmonization have been recently made or are being presently carried out—For example, the principles for the harmonization of procedural rules in transnational commercial disputes of the American Law Institute and UNIDROIT in the USA;[34] in Latin America, the implicit recognition of the PICC in the Inter-American Convention on the Law Applicable to International Contracts by referring to the general principles of international trade law;[35] in the African region, the request of the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) to UNIDROIT to prepare a draft of a Uniform Act on Contract Law based on the PICC;[36] and in the case of the Middle East, different voices claim that the PICC could be a neutral (say non-Western, non-national) instrument that could favour a non-disturbing harmonization of commercial law in this region.[37]

[31] Claire Dickerson, 'OHADA's Proposed Uniform Act on Contract Law' (2011) 13 European Journal of Law Reform 462.

[32] Niklas Luhmann, *Vertrauen* (Lucius and Lucius 2000); see also Niklas Luhmann, *A Sociological Theory of Law* (Routledge 1985).

[33] Kilian Bälz, 'Islamic Law as the Governing Law under the Rome Convention: Universalist Lex Mercatoria versus the Regional Unification of Law' in Eugene Cotran and Martin Lau (eds), *Yearbook of Islamic and Middle Eastern Law: 2001-2001* (Brill Academic Publishers 2003) 73, 84.

[34] Michele Taruffo, 'Harmonisation in a Global Context: The ALI/UNIDROIT Principles' in Xandra Kramer and Remco van Rhee (eds), *Civil Litigation in a Globalising World* (Springer 2012) 207.

[35] Alis Aguirre and Nelly Manasía, 'Los Principios de Unidroit en las relaciones comerciales internacionales' (2006) Revista de Derecho 47. Inter-American Convention on the Law Applicable to International Contracts 33 ILM 732 (1994).

[36] See Marcel Fontaine, 'The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts' (2004) 9 Uniform Law Review 573; Samuel Kofi, 'The UNIDROIT Principles of International Commercial Contracts and the Harmonisation of the Principles of Commercial Contracts in West and Central Africa' (2004) 9 Uniform Law Review 269. See also Dickerson (n 31).

[37] See Bijan Izadi, 'Harmonisation of Commercial Contract Law in ECO Region: A Role for the UNIDROIT Principles' (2001) 6 Uniform Law Review 301; Mahdi Zahraa and Aburima Abdullah Ghith, 'Specific Performance in the Light of the CISG, the UNIDROIT Principles and Libyan Law' (2002) 7 Uniform Law Review 751; and Bashar Malkawi, 'Prescription in Arab Civil Codes and the Unidroit Principles of International Commercial Contracts of 2004: A Comparative Analysis' (2008) 20 Bond Law Review 82.

As seen, even in those regions where the factual penetration of the PICC is particularly low (as seen in the empirical data), they are taken into consideration in novel harmonizing projects, drafts, and conventions (as seen in the sociological analysis). In one way or another, although their application is certainly low when compared to traditional international and domestic instruments, the PICC produce a direct or indirect globalizing effect. The internal connection between transnationalized (disembedded) commercial practices and their translation into the Principles transform them into an easily accessible instrument when the expectations in business relations have been disappointed for whatever reasons. Certainly, the PICC are unevenly distributed in commercial matters in world society, yet thanks to this internal connection between commercial operations and the Principles, every agent has the possibility of reflecting herself into them and stabilizing her normative expectations of conduct by invoking them—regardless of academic denominations such as 'soft law,' 'non-binding law,' or 'contract sans loi.' In this sense, the PICC contribute to the making of world society from the intersection between commercial relations and legal provisions. The question now is what is the scale of this contribution.

IV. The social extensions of the PICC

One way to measure the potential impact of the PICC is to analyse the most significant social systems with which the commercial interchange is—in one way or another—regulated by the Principles. This measurement is presented in Figure 6. In this vein, 'economy' (67.3 per cent) comprises mainly the interchange of goods, real state, and the energy sector—namely, extracting or goods-producing activities; 'finance' (9.5 per cent) includes cases with shareholders, pensions, banking, and so on; 'science/technology' (7.3 per cent) involves inventions, transfers of know-how, high tech, and software issues; 'judicial' (4.7 per cent) contains issues on the site of arbitration, interpretation of contracts, and so on; 'health' (3.3 per cent) includes cases related to cleaning machinery, dental works, and waste water systems; 'media/arts' (2.5 per cent) comprises issues such as broadcasting, advertising, music, and motion pictures; 'tourism' (2.5 per cent) comprises hotel industry and cruise ships; 'military' (1.5 per cent) refers to transactions of military equipment and anti-missile systems; and 'sports' (1.5 per cent) contains issues on football and athletics.

Actually, this distribution is closely related to the historic level of development of functional systems in modernity as expressed in sociological theory, with law and economy being two of the most expanded and dense social fields; science, health, and finance being born between the eighteenth and nineteenth centuries; and media, sports, and tourism being the latest social fields undergoing a process of differentiation.[38] In other words, the distribution of UNIDROIT cases reflects the historic density of social systems.

[38] Stichweh, 'Das Konzept der Weltgesellschaft' (n 19).

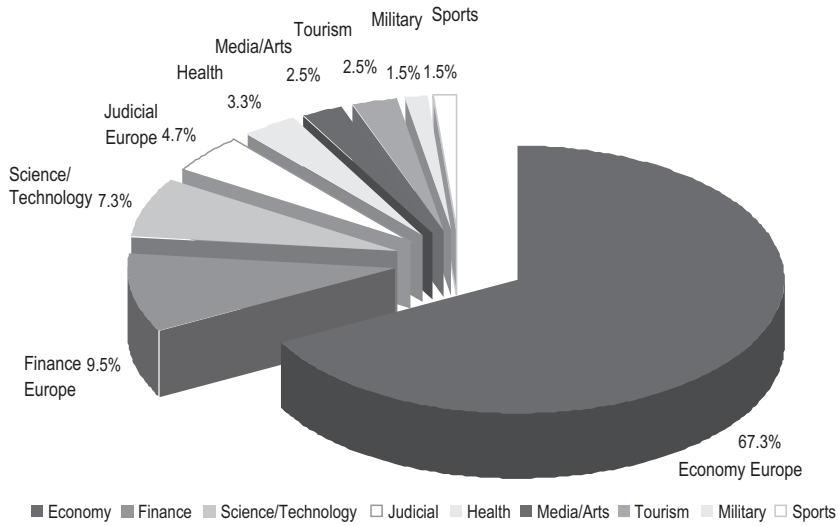

Figure 6. The PICC by social systems (%, N = 275)

Nonetheless, when the same kinds of activities are observed as if they were just internal operations of the economic system, then a complementary depiction is gained. For this purpose, it is necessary to redistribute the cases with an internally meaningful economic distinction, namely that of a primary, secondary, and tertiary economic sector.[39] As is already known, the primary sector involves all extracting activities and the production of raw materials; the secondary sector means the manufacturing of goods; and the tertiary sector includes the supplying of services. Figure 7 illustrates the number of cases regulated by the PICC according to their economic sectors from 1994 to 2011.

Figure 7 shows that the cases in the secondary sector are most prone to include the PICC, followed by the tertiary sector. The primary sector has always been reluctant to follow the PICC—the reported cases amount to 2.2 per year, while secondary and tertiary sectors amount to 7.5 and 5.5 cases per year respectively. Taking into account the confidential character of arbitration and the reported nature of the UNILEX database, some cautious intermediary conclusions might be extracted from this data. Namely, (i) the PICC are more quoted in controversies of manufactured goods, which is an expected result once we acknowledge the complexity of the market of manufactured products and the supplementary character of the PICC with regard to national and international law; (ii) the low number of references to the PICC in cases of the primary sector might be related to its national-strategic character, which is generally averse to the use of principles of law and more inclined to classic international instruments such as the CISG or

[39] For a classical view on this distinction, see Simon Kuznets, *Toward a Theory of Economic Growth* (Cambridge University Press 1968). For an expansion of this distinction to a quaternary sector, see Zoltan Kenessey, 'The Primary, Secondary, Tertiary and Quaternary Sectors of Economy' (1987) 33 Review of Income and Wealth 359.

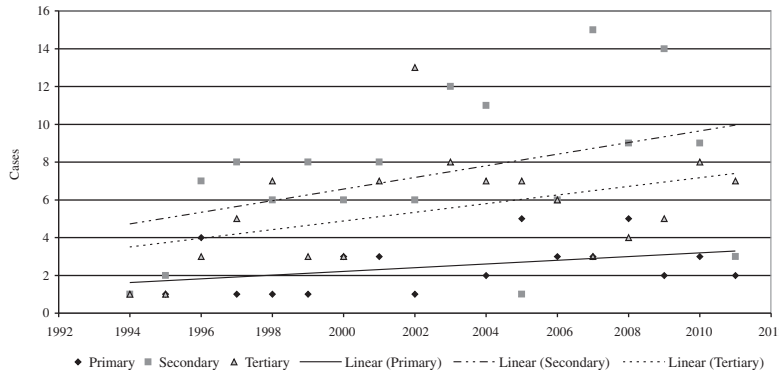

Figure 7. UNIDROIT cases by economic sector, 1994–2011 (N = 270)

directly predisposed to domestic laws; (iii) it seems to be an opportunity for the PICC to expand their applicability to contract regulations in the tertiary sector given the absence of an established international or supranational instrument to regulate the contract of services (besides specific UNIDROIT conventions on factoring and leasing).[40]

A two-sided depiction of the PICC could be outlined so far regarding their contribution to the making of world society from the intersection between commercial relations and normative regulations. On the one side, the uneven regional expansion of the PICC (as seen in the previous section) and also its uneven sectoral growth reveals that the Principles are predominantly a European phenomenon related to a classically industrialized economy of manufactured products and goods (neither an economy of raw materials nor an economy of services). This should partially explain why the Principles are weakly applied in Africa, the Middle East, and Latin America and are used more in Asia and Eastern and Western Europe.[41] On the other side, notwithstanding the concentration in the European region and in an economy of manufactured products and goods, the distribution of data and different emerging projects of harmonization in almost all of the regions of world society, as well as the couplings of the PICC with other social fields beyond the secondary economic sector (especially services in science and technology, health, judicial matters, and finance), provide evidence to assess the contribution of the PICC to the making of world society in the field of private commercial law. In the next section, we shall go into this topic more deeply.

[40] See, for example, the possibilities of application in electronic contracts in Emily Weitzenböck, 'Good Faith and Fair Dealing in Contracts Formed and Performed by Electronic Agents' (2004) 12 Artificial Intelligence and Law 83.

[41] As seen earlier, the low penetration of the PICC in North America is explained by an already existing internal restatement tradition and the categorization of the Principles as 'foreign law'.

V. The protection of normative expectations through the PICC

One of the most discussed issues since the 1980s regarding the normative properties of non-state instruments such as the PICC (and the *lex mercatoria* in general) was well represented by the dichotomy between hard and soft law. As recently observed, the distinction divided the field:

> On the one hand, there are the advocates of the notion [of soft law] for whom the binary nature of law is incapable of explaining the complexity of the international exercise of public authority in a pluralized world or who see soft law as an instrument of (programming of the) development of hard law. These apostles of the notion of soft law are opposed by those who see the notion as redundant because it turns into either hard law or not law at all, it is self-serving for the profession, it is dangerously deformalizing our instruments of law ascertainment, or it is weakening the general authority of law.[42]

Two phases of this debate can be identified. The first one took place especially in the 1990s. The distinction was conceived of as a hierarchy in which soft law is incomplete hard law.[43] Completeness of law would mean formality and, particularly, enforceability of law—that is, the classical Weberian topic of power as a chance to realize one's own will even against others' resistance.[44] As modern State concentrates legitimate power, there is no law beyond the State for this approach. Indissolubly linked to State power. Hard law is complete law because behind it the state functions as a warrant of enforceability. Soft law would be thus incomplete law because it only relies on itself and not on State power. Consequently (though not logically), hard law would be binding law and soft law non-binding law, which announces the paradox of soft law—it is law and it is not at the same time.

The second phase (from the late 1990s onwards) dealt with this paradox in different ways. One way is to trace back the genealogies of 'softness' (to the medieval *lex mercatoria* and the nineteenth-century anti-formalism) and identify the sustaining ideologies behind it (spontaneist and autonomist, on the one hand, solidaristic and inclusion-promoting, on the other hand), which also may have supported different types of hard law.[45] A second approach is to depend on a discursively constructed overarching concept of international public authority that should be complemented by instrumental, procedural, and substantive standards whose legitimacy would depend on soft norms.[46] A third approach

[42] Jean D'Aspremont and Tanja Aalberts, 'Which Future for the Scholarly Concept of Soft International Law? Editor's Introductory Remarks' (2012) 25 Leiden Journal of International Law 309, 309–10.

[43] Abbot and Snidal (n 7).

[44] Max Weber, *Economy and Society* (University of California Press 1978) 53.

[45] Di Robilant (n 7).

[46] Goldmann (n 7).

focuses on the operation of soft law norms rather than on the enumeration of the multiple components of the definition (principles, rules, documents, statements). In focusing in this way, the problem becomes the boundary between what is law and what is not or between law and other social systems, not an essentialist conception of a hierarchy of norms.[47] And a fourth way of dealing with the paradox is, on the one hand, to explore the systemic character of soft law in the widespread infrastructure of multiple arbitral tribunals, arbitrators, awards, and an increasing arbitral jurisprudence and, on the other hand, to assess the self-constitutionalizing organization of soft norms by means of the application of primary (contract obligations) and secondary norms (rules of law, principles, codifications).[48]

As a project of codification of practices and customs, the PICC seem to fulfil the role of secondary norms that apply to contracts and controversies in arbitral as well as domestic tribunals. If they are being applied—as we have shown in previous sections (either as supplementing international and national law or as law governing the contract)—then they are not only representing cognitive modes of doing and conceiving things (new definitions, alternative procedures, knowledge improvements, higher levels of reflexivity), but they are useful in accomplishing the function of counterfactually protecting normative expectations.[49] As Matthias Goldman argues, '[l]aw establishes, confirms, or destroys normative expectations, not only cognitive expectations'.[50] To this extent (and following Jaye Ellis' criterion of distinguishing between law and not law), the PICC function effectively as a form of law for those who recognize its self-binding quality. As long as they are a 'full-fledged codification of lex mercatoria',[51] *lex mercatoria* itself should also be considered this way. It might be right that the PICC and the *lex mercatoria* are not a self-sufficient legal system because of their interpenetration with national and international law and tribunals,[52] yet the same could be said for the case of domestic law systems that should be supplemented by international or a-national law such as the PICC. Completeness is not an option in world society, even (perhaps particularly) for the State.

One of the most relevant indicators to realize whether the PICC are actually fulfilling their expected function is to observe data on acceptance/non-acceptance of the Principles by tribunals. The following figures describe this topic.

[47] Ellis (n 7). On this topic, see also Gralf-Peter Calliess and Moritz Renner, 'Between Law and Social Norms: The Evolution of Global Governance' (2009) 22 Ratio Juris 260.

[48] Gunther Teubner, 'Constitutionalizing Polycontexturality' (2012) 20 Social and Legal Studies 210; see also Gunther Teubner, ' "Global Bukowina": Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law without a State* (Dartmouth 1997) 3.

[49] Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1997).

[50] Goldmann (n 7) 337.

[51] Michaels (n 2) 457.

[52] Ibid.

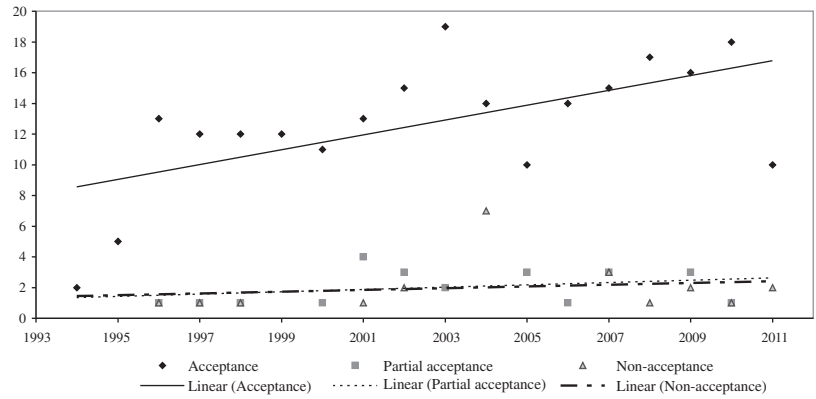

Figure 8. Levels of acceptance of the PICC, 1994–2012 (N = 274)

As Figure 8 shows, the acceptance of the PICC as legitimate law (namely, protecting normative expectations) by parties and tribunals increased from 1994 to 2010.[53] Partial acceptance and rejection of the PICC behaved in an almost identical way, yet they are considerably lower than the acceptance of the Principles.[54] The fact that the PICC are not being considered *terra incognita*, neither by arbitral nor by domestic tribunals, is shown in Figure 9—the number of valid domestic cases applying the Principles amounts to 114 cases and to 168 cases in arbitral tribunals. Alternatively, as explicitly stated in the preamble to the PICC, they also aim to supplement domestic law and to serve as a model for national and international legislators.[55] Figure 10 shows that this expectation has been fulfilled so far and shows that they are also invoked as a normative means for interpreting the contract (especially by parties, though normally rejected by tribunals) and as a complementary comment to a decision made according to domestic law (particularly in Chinese tribunals).

Figure 11 makes evident that the acceptance of the PICC is high in every region of world society when compared to their partial acceptance and their non-acceptance. Certainly, the number of cases by region is moderately shifting (and again the restrictions of the database should be taken into account), yet the more the amount of valid cases in each region increases, the more the difference between acceptance and non-acceptance of the PICC is amplified. A similar

[53] The number of cases decreases in 2011, yet the gradually reported nature of the database explains such a decrease. See section 2 and note 23 of this article.

[54] 'Acceptance' means the application of the PICC to the substance of the case. 'Partial acceptance' includes expressions such as 'furthermore', 'without expressly referring', 'to some extent', and references to the PICC without further explanation. 'Non-acceptance' means that the PICC are referred either by parties or the tribunal, but they are not applied to the case—that is, tribunals expressly reject the Principles.

[55] PICC (n 9).

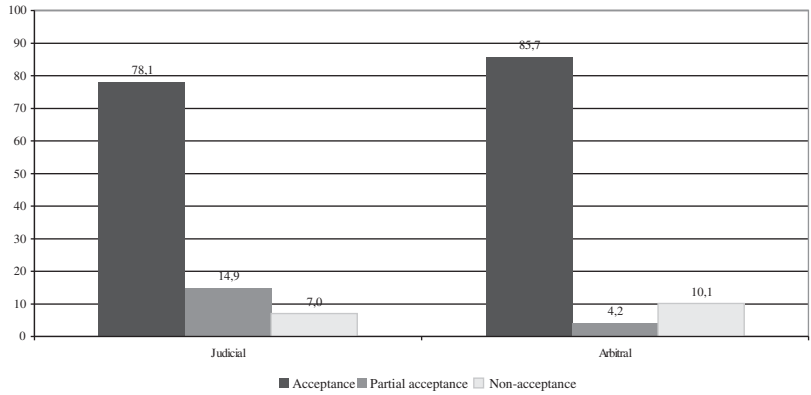

Figure 9. Levels of acceptance of the PICC by type of court (%, N = 282)

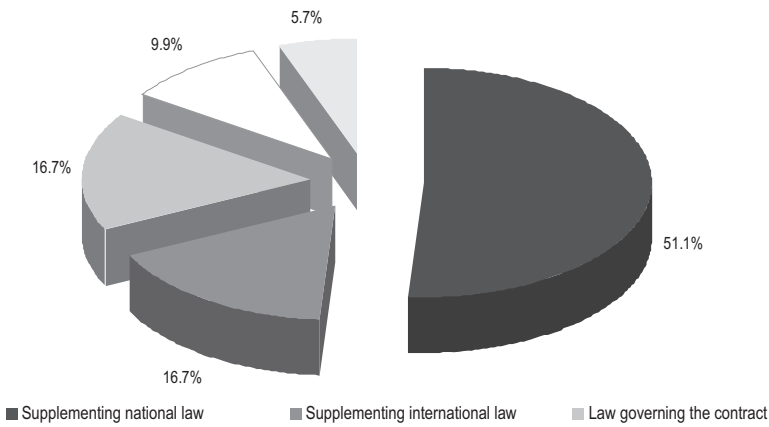

Figure 10. Use of the PICC (%, N = 282)

situation arises when data on acceptance/non-acceptance are analysed by social systems (Figure 12), namely the levels of acceptance are in every case significantly higher than partial acceptance and non-acceptance. In other words, the function of protection of normative expectations by means of the PICC is extended both factually (to different regions of world society—in any case at different levels, as seen in Figure 2) and socially (to multiple social systems entering into commercial relations). Theoretically, acceptance means a recognition that the expected norm is provided by the PICC. Therefore, the question is now what kind of normative expectations are being in fact protected by the Principles (that is, in the real practices of the involved agents). This question can be precisely answered by reviewing data on the most invoked rules of the PICC.

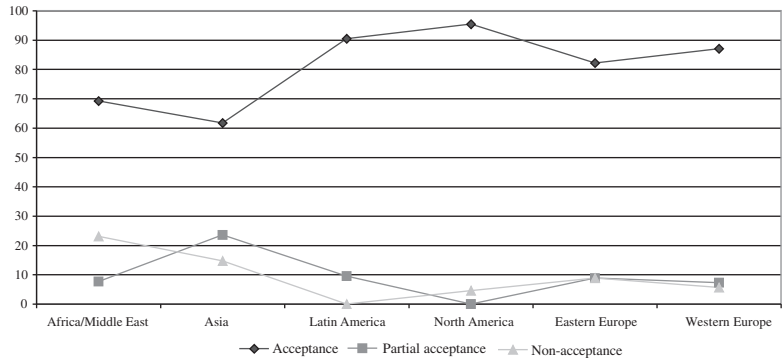

Figure 11. Acceptance/non-acceptance of awards and sentences invoking the PICC by regions of world society (%, N = 259)

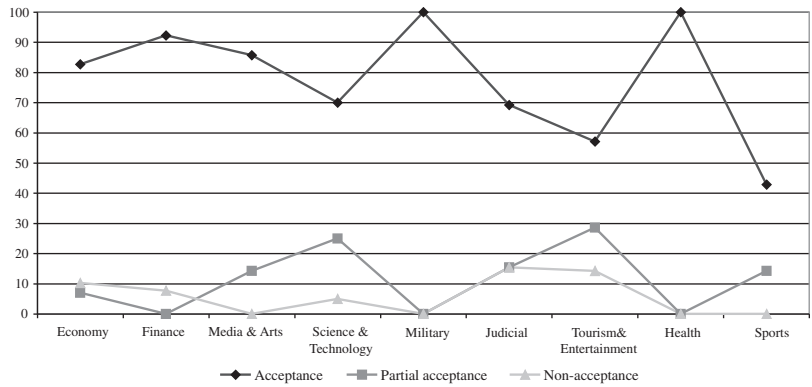

Figure 12. Levels of acceptance of the PICC by social systems (%, N = 275)

Figure 13 reveals that the greatest number of references to the PICC in the reported cases belongs to Chapter 7 on non-performance (32 per cent), namely the 'failure by a party to perform any of its obligations under the contract, including defective performance or late performance' (Article 7.1.1). Theoretically, non-performance means disappointing key normative expectations in a contractual relationship. Two main questions arising here are, first, when is non-performance acceptable and, second, how the disappointed expectation can be re-stabilized. Consequently, from this 32 per cent, the most invoked articles are: Article 7.3.1 on right to terminate the contract (13 per cent within the chapter's articles), Article 7.4.2 on full compensation (8 per cent), and Article 7.4.9 on interest for failure to pay money (16.7 per cent), which precisely tackle those questions (7.3.1 the first question; 7.4.2 and 7.4.9 the second question).

In second place is Chapter 4 on interpretation (with 19.2 per cent of references), and whose most cited articles are: Article 4.1 on the intention of the parties (30.9

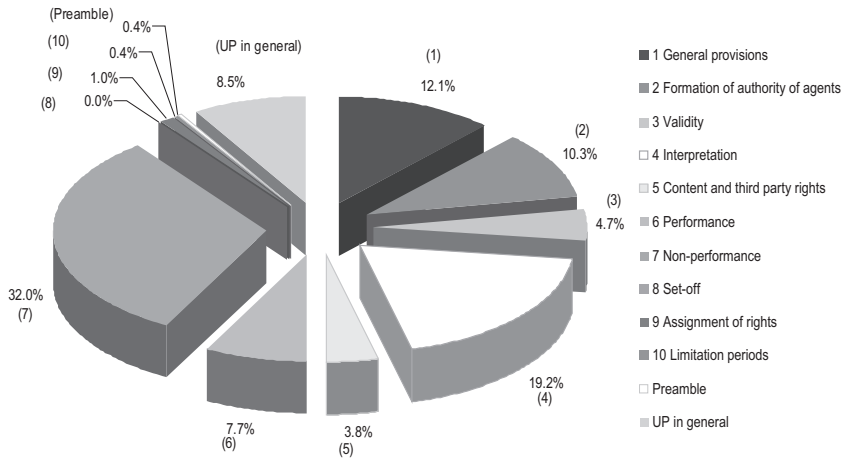

Figure 13. Citation of Chapters of PICC (%, N = 506, mo)

per cent within the Chapter's articles), Article 4.2 on the interpretation of statements (14.4 per cent), and Article 4.3 on the relevant circumstances (for interpretation) (22.7 per cent). Party autonomy and freedom of contract are one of the essential inspirations of the PICC as stated in Article 1.1.[56] Yet party autonomy does not mean autonomy of each party but, rather, autonomy of the (contractual) system freely created by the parties—that is, agreed autonomy in terms of one's own expectation of others' expectations, namely doubly coordinated interdependent expectations.[57] Those articles referred to in Chapter 4 protect the autonomy of the 'contractual system' by limiting the conduct of the parties to evidently known previous actions and to the understanding of 'reasonable persons,' which, in turn, means the expectable expectation of persons with 'the same linguistic knowledge, technical skill, or business experience as the parties'.[58] Article 4.3 reinforces the systemic character of the autonomy by referring to the conditions of interpretation of other conduct to the 'history of the system', namely to preliminary negotiations, previous practices, conducts and shared meanings between the parties. In other words, with these provisions the expectation protected is that the contract governs itself by excluding systemically unknown intentions (by excluding indeterminacy). Once again, conditions should be found in the agreement between the parties—that is, in the moment in which the parties become a system of expectations of expectations.

Chapter 1 on general provisions (12.1 per cent) occupies third place with one of the most cited articles of the PICC: Article 1.7 on good faith and fair dealing (74

[56] See also Michael Bonell, 'Soft Law and Party Autonomy: The Case of the Unidroit Principles' (2005) 51 Loyola Law Review 229.

[57] Luhmann, *A Sociological Theory of Law* (n 32) 22–102.

[58] PICC (n 9) 138.

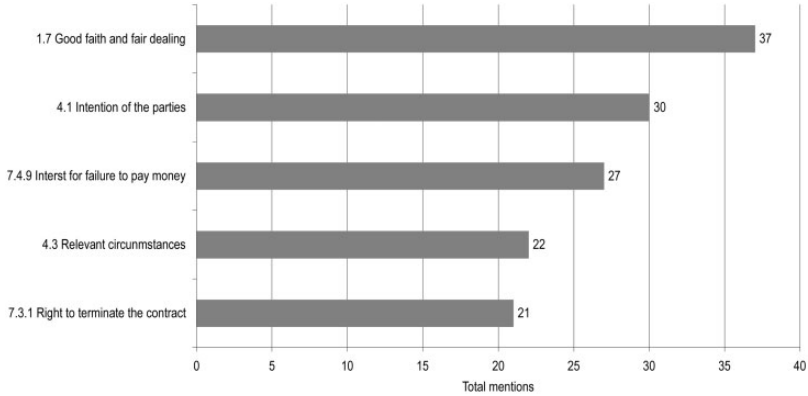

Figure 14. Most invoked articles of the PICC (number of mentions)

per cent of the citations in this Chapter) and probably their most fundamental and transversal provision (see discussion later in this article). It follows Chapter 2 on formation and authority of agents (10.3 per cent). Finally, 8.5 per cent of cases refer to the PICC in general (see Fig 13), mainly as a source in which support can be found for decisions made according to national law or to other international instruments such as the CISG (the most referred international instrument related to the PICC, with 73 references, 36.3 per cent), the International Chamber of Commerce Rules of Arbitration (39 references, 19.4 per cent), and the Principles of European Contract Law (33 references, 16.4 per cent).[59]

In addition to this general view, Figure 14 gets into details and displays the five most cited articles of the PICC (over 10 references each in the valid reported cases). Article 1.7 on good faith and fair dealing is the most invoked one. It is commonly accepted that good faith and fair dealing are the underlying directives of the PICC—and not only of the Principles themselves but also of *lex mercatoria* and commercial contracts.[60] In this vein, good faith and fair dealing do not mean a sort of moral control over the normative expectations protected by the contract. Rather, they are a formula to process the unexpected events that may (and shall) affect it. As Gunther Teubner argues, '[d]ue to its high degree of indeterminacy, the general clause of good faith is particularly suited to link contracts selectively to

[59] International Chamber of Commerce, International Court of Arbitration, Rules of Arbitration, ICC no 808 (1998); Ole Lando and Hugh Beale (eds), *Principles of European Contract Law,* parts 1 and 2 (Kluwer Law International, Hague 2003).

[60] Bonell, *An International Restatement of Contract Law* (n 14); see also Klaus Peter Berger, 'The Relationship between the UNIDROIT Principles of International Commercial Contracts and the New Lex Mercatoria' (2000) 5 Uniform Law Review 153; Charles Brower and Jeremy Sharpe, 'The Creeping Codification of Transnational Commercial Law' (2004–05) 45 Virginia Journal of International Law 199; Federica Rongeat-Oudin and Martin Oudin, 'The Reception of The UNIDROIT Principles by the Lex Mercatoria: The Example of Good Faith' (2009) 6 International Business Law Journal 697.

their unstable social environments with constantly shifting and conflicting requirements'.[61]

In a factually, socially, and temporarily differentiated world society, a number of contingent facts, fragmented interests, and contradictory expectations pull the contract into diverging directions. As principles, good faith, and fair dealing recognize and assume the eventual consequences of these complexities, they introduce them as latent possibilities into the contract and redirect them towards particular rules for a further and more specific treatment. As stated in the commented edition of the PICC, '[t]here are a number of provisions throughout the different Chapters of the Principles which constitute a direct or indirect application of the principle of good faith and fair dealing'.[62] Over 40 provisions (such as *force majeure*, hardship, relevant mistakes, intention of the parties, revocation, partial performance, interference by other party, and partial assignment of a monetary sum, among others) are considered as being applications of the principle. Some of these articles have been already discussed. Suggestively, they include the second most referred article of the PICC displayed in Figure 14, Article 4.1 on the intention of the parties (and, consequently, its related Article 4.3 on relevant circumstances).

Probably, the best way to illustrate the protection of normative expectations is to pay attention to the conditions of (contractual) disappointment and to the forms in which the disappointed expectations are re-established. Article 7.3.1 on the right to terminate the contract (the fifth most referred article) and Article 7.4.9 on the interest for failure to pay money (the third most referred one) tackle precisely these two points. Article 7.3.1 specifies the conditions under which a fundamental non-performance takes place. Fundamental non-performance means 'depriving the other party of its expectations',[63] non-compliance of essential conditions (for example, time of delivery of commodities), a reckless behaviour in performing the contract (or intentional non-performance), and no reliance on future performance (for example, defects at early stages of a building). Alternatively, Article 7.4.9 protects disappointed expectations by relating damages to fines, namely to interests in case of delayed payment (even if the non-payment is excused) and to additional compensations in case of a greater harm. To this extent, the normative expectation is protected by money, the symbolic communication medium of the *societas mercatorum*.

After all, the discussions as to whether the *lex mercatoria* in general and the PICC in particular are either soft or hard law become irrelevant when the question addresses a more pragmatic issue: whether the Principles protect normative expectations or not. It seems also irrelevant to discuss whether the PICC as a codification of *lex mercatoria* are an autonomous system of law or not. As long as they understand themselves and are applied by agents and tribunals as a

[61] Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 Modern Law Review 11, 23.

[62] PICC (n 9) 19.

[63] Ibid 250.

supplement of domestic and international law, they become part of the law of world society and not another independent law. This interaction with domestic and international law is precisely what reinforces the PICC as a dimension of the world law. Certainly, there is no law beyond the law. The only question is when non-law becomes law, and a possible answer is when it effectively protects normative expectations as part of a system of already legitimate law.

VI. Conclusion

From the last two decades of the past century onwards, an increasing number of transversal social sectors have adopted a crucial role in defining the profile and contours of modern world society. Different corporate private and semi-private actors, transnational firms, formulating and regulating agencies, institutional networks, and intergovernmental and non-governmental organizations have developed several forms of self-regulation and governance that interact and collide with each other at multiple social levels and in different substantive issues. Consequently, the search for harmonization has turned to a major topic in transnational politics and law, particularly when State law and even international law has proven to be insufficient to efficiently regulate the multi-layered, transversal, and accelerated dynamic of modern social relations in fields such as the Internet, finance, or commerce.

The development of the PICC, which were first published in 1994 by UNIDROIT and revised in 2004 and 2010, has become one of the well-known efforts towards the harmonization of private commercial law. By means of a combination of principles, rules of law, and specific provisions, the PICC codify the practices, behavioural patterns, and directives of action of the so-called *lex mercatoria*, namely the customary regulations governing the interactions of the community of merchants in the modern global world. Taking the historical role of commerce as a carrier of structural and semantic modes of social organization, a sociological analysis has been developed regarding the contribution of the PICC to the formation of world society in the intersection between commercial issues and private regulations. Assuming that world society does not only mean contact between different regions of the world but also the formation of equivalent institutionalized modes of (self-)regulation and interpretation of actions and communications across different times and places (disembedding), this article has aimed to test three hypothesis connecting the application of the Principles and the formation of world society: first, that as an instrument working at a world society level the PICC should not be restricted to just one or a few regions of the world; second, that as a legal instrument in the field of commerce, they couple different social sectors (that is, they have relevance not only for commercial practices); and, third, that the PICC effectively function as a legal instrument for the protection of normative expectations.

Regarding the first hypothesis, data have shown that the application of the PICC is unevenly distributed alongside different regions of world society. They are

mostly invoked and applied in Western and Eastern Europe (and in controversies between these regions). Nonetheless, the PICC have been also invoked in other regions, even in cases involving nationals of the same country (particularly in Asia and Latin America) and in inter-regional cases, although the number of extra-European references is half of the European cases. Yet, the role and contribution of the PICC to a globalizing world society in commercial matters should not only be assessed in terms of the number of cases in each world region. Available data are too narrow to make this hypothesis plausible. Analysis should thus turn to socio-historical interpretations. As shown, in every region of world society, there are relevant projects of harmonization either inspired in or related to the Principles—the American Law Institute's/UNIDROIT project in the USA, the Principles of Contract Law in Europe, the request for a Uniform Act on Contract Law of OHADA in Africa, the recognition of the PICC from the Inter-American Convention of Applicable Law to Contracts, and the alleged neutrality of the Principles for the Middle East. Along with the application of the PICC, these projects produce a globalizing effect, namely they extend the influence of the Principles across national borders and they make it possible to treat comparable commercial controversies in different parts of the world under the same criteria. Of course, the PICC are not the only applicable law and not always the law governing the contract, but they do interact with domestic and international law, thus introducing—by means of rules, principles, interpretations, and conditionalities—a transnational effect that contributes to the making of world society in the intersection of commercial and legal affairs.

While the first hypothesis observes predominantly the temporal and spatial distribution of the PICC, the second hypothesis focuses on their social interactions with both other social systems and economic sectors (primary, secondary, tertiary). On the basis of the available data, we have illustrated those relationships, first, by analysing the controversies between social fields invoking the PICC and, second, by observing the economic sectors involved in such controversies. The controversies are not restricted to one or a few systems, but, rather, they include transactions involving economy, science and technology, finance, health, and media as the most relevant spheres. Alternatively, data show that the secondary economic sector (manufactured goods and products) is the most inclined to invoke the PICC (although not excluding relevant cases in extracting economic activities and services). By elaborating on this finding from a sociological point of view, we have concluded that the penetration of the Principles in different regions of world society is and shall be mainly related to the complexity of the commerce of manufactured goods or, in other words, to industrialized economies. To this extent, it might be predicted that Asia, Latin America, and evidently North America (if they change their vision of the Principles as 'foreign law') will show an increasing tendency to include the PICC in their contractual controversies in the years to come.

The third hypothesis asked whether the PICC fulfil the function of protecting normative expectations. Certainly, the protection of normative expectations is

not the only condition to identify the emergence of law. It is rather a minimal requirement—a legislative procedure, an organizational infrastructure of deciding tribunals, and a recursive circle between past and present decisions, between doctrine and cases, legitimization, and acceptance. Nonetheless, as a minimal requirement, the protection of normative expectations should always be present when it comes to law. Regarding the PICC, the data and sociological analyses carried out in this article evidence that they fulfil this function, particularly before arbitral tribunals (their organizational infrastructure) as well as in domestic controversies. The acceptance of the PICC as legitimate argument (as long as data can illustrate) is high in every region of world society and for different social systems interacting in commercial disputes. Alternatively, the fact that the article on good faith and fair dealing is the most cited one reveals an internal connection between the PICC and the normative expectations of those to whom the Principles are addressed. In theoretical terms, there is a recursive circle of expectations of expectations—that is, the actor's expectations on the one side, the PICC on the other. In doing so, the PICC also contribute to protect normative expectations of domestic and international legislation, as long as they provide them with supplementary interpretations to enhance the normative scope of law.

If world society means the emergence of structural and normative foundations of sociality across undefined social spheres and places, then the PICC are an emerging driving force of world society in legal-commercial affairs— structurally because they produce and facilitate cross-border (and cross-regional) social operations of (among others) a legal, commercial, technological, and financial nature and normatively because they synthesize latent normative expectations and make them available for every agent in the merchant world. Without excluding national and international law, but, rather, by interacting with them, the PICC thus become part of the law of world society.