

***LEX SPORTIVA: SPORTS LAW AS A TRANSNATIONAL
AUTONOMOUS LEGAL ORDER***

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INTRODUCTION

The globalization of sport has shifted the legal regulation of the international sport system increasingly towards the private authority of international and national sport bodies. Legal commentators have suggested that this growth in private self-governance has led to the development of a global sports law that operates autonomously and independently from national legal systems.¹ For these commentators, global sports law is seen as being part of a larger movement towards the transnationalization of the legal system, and therefore analogous to other emerging forms of global law, such as *lex mercatoria*.

However, the notion that a global sports law exists and operates independently from nation states is disconcerting for scholars that view self-regulatory systems as inherently dangerous. Foster, for example, argues that the term ‘global sports law’ is merely a cloak for the continued self-regulation of international sport bodies and the avoidance of intervention into the affairs of international sport by sovereign actors.² Implicit in this argument is an assumption that if international sport is immune from regulation by national legal systems, then there can be no legal accountability for sport bodies that violate universal principles of law, such as fairness and equity, when exercising their regulatory authority.

Concerns regarding the regulatory autonomy of international sport bodies have typically been academic. However, where the rules and activities of international sport bodies conflict with

¹ Foster, K., *Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport’s Jurisprudence* in Ian Stewart Blackshaw, Robert C. R. Siekmann & Janwillem Soek, eds., *The Court of Arbitration for Sport, 1984-2004* (The Hague: T.M.C. Asser Press, 2006) at 420 [Foster, “Lex Sportiva”]; Foster, K., “Is There a Global Sports Law?” (2003) 2:1 Entertainment and Sports Law Journal 1 [Foster, “Global Sports Law”]; Mitten, Matthew, “Judicial Review of Olympic and International Sport Arbitration Awards: Trends and Observations” (2009) 9 Pepperdine Dispute Resolution Law Journal; Michael Beloff, Tim Kerr, Tim & Marie Demetriou, *Sports Law* (Oxford: Hart Publishing, 1999) [Beloff, “Sports Law”].

² Foster, “Global Sports Law”, *ibid.* at 2.

national law, these concerns take on a practical significance. In these instances, a central issue emerges, namely, whether international sport bodies should be forced to comply with the laws of a single national legal order, or whether their own rules are of such independent validity and legitimacy that they can be regarded as law in their own right – a law which displaces national law.

These issues are revealed in the recent Canadian case of *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games*³ involving female ski jumpers challenging the decision of the International Olympic Committee not to include women's ski jumping at the 2010 Olympic Games. The case highlights both the supreme authority of the International Olympic Committee, and the relative lack of authority of national courts, over the Olympic Games specifically, and international sport generally. Furthermore, it raises fundamental issues surrounding the difficulties that exist in imposing boundaries on the regulatory authority of international sport bodies.

The purpose of this paper is threefold. First, it sets out to examine whether the international sport system may be accurately described as a transnational autonomous legal order. Second, it examines whether the rules of this legal order, that is, the rules of international sport bodies, operate with relative immunity from national legal systems. Third, it addresses the inadequacies of relying upon state-based initiatives to regulate international sport by suggesting alternative regulatory mechanisms for ensuring that global sports law conforms to the universal legal principles of fairness and equity.

³ See *infra* note 389 and its accompanying discussion.

The paper is divided into five parts. Part One sets out the socio-legal framework for understanding the concept of a transnational autonomous legal order. Part Two outlines the architecture of the international sport system — its self-regulating hierarchy of private bodies and its delocalized systems of dispute resolution. Part Three applies the theoretical framework described in Part One to the international sport system to determine the extent to which it operates as an autonomous global legal order. Part Four introduces three case studies that illustrate the problems that can arise when global sports law conflicts with national law, and the difficulties that national courts face when attempting to resolve such conflicts. Finally, Part Five summarizes the barriers that exist for national legal systems in regulating international sport, and suggests alternative mechanisms that may be used to regulate international sport bodies and the development of global sports law.

I. TRANSNATIONAL LEGAL ORDERS AND THE *LEX MERCATORIA*

A. Overview

In order to theorize about global sports law as a transnational autonomous legal order, it is necessary to first appreciate the broader process of globalization and the concomitant transnationalization of the legal field. The following section of this paper explores the process of globalization and its effects on the boundaries between public and private authority, and law-making processes. It begins with a discussion of how globalization has shifted the location of the boundary between public and private authority through the growth of nonstate power in various sectors of society, and the impact that this has had on the emergence of decentred law-making processes that are relatively insulated from nation states. This is followed by a

discussion of *lex mercatoria* as a paradigmatic example of a transnational autonomous legal order. Relying primarily on the scholarly work of Gunther Teubner and Claire Cutler, the theoretical structure underlying the legitimacy of an autonomous legal order will be canvassed, for the purpose of applying it to global sports law.

B. Globalization and the Emergence of Private Authority and Law-Making

The term globalization refers to the creation of a world society.⁴ However, the term is not meant to describe a centralized world government⁵ comprising a multitude of nationally organized societies.⁶ Instead, it more accurately describes a society governed “by, with and without governments”.⁷ Implicit in this description is the recognition that states are no longer the leading forces in globalization as nonstate actors begin to exercise greater autonomous authority over various clusters of economic, cultural, technological and social activities, effectively undermining the former monopoly of states over such matters.⁸ In actuality, globalization has been largely facilitated by the emergence of private authority and self-regulatory systems in various sectors of society, such as the economy, science, culture, technology, health, social services, the military, transport, and sport.⁹ This has enabled numerous social systems to develop into a genuine global society, or more accurately, a fragmented array of individual

⁴ Teubner, Gunther, ““Global Bukowina”: Legal Pluralism in the World Society”, in Gunther Teubner (ed.) *Global Law Without a State* (Bookfield, Vermont: Dartmouth Publishing, 1997) at 23.

⁵ Nowrot, Karsten, “Global Governance and International Law”, No. 33 in Paper Series Beitrge zum Transnationalen Wirtschaftsrecht, online: <www.wirtschaftsrecht.uni-halle.de> [Nowrot, “Global Governance”].

⁶ Teubner, *supra* note 4 at 22.

⁷ Rosenau & Czempiel (eds.), *Governance Without Government*, 1992, cited in Nowrot, “Global Governance”, *supra* note 5 at 12.

⁸ Teubner, *supra* note 4 at 5.

⁹ *Ibid.* at 6.

global societies, independent from states.¹⁰ Further, although states have played an influential role in facilitating globalization — for example, by removing barriers to trade and investment¹¹ and providing a system for the enforcement of foreign arbitration awards¹² — they have been forced to tolerate, cooperate, and in some cases, defer to, private forms of authority in areas that are now nearly beyond their territorial control.¹³

With respect to the impact of globalization on law-creation, it is the rule-making or norm producing processes within these emerging private sectors of world society that form the basis of transnational or global law. As Teubner notes, “global law will grow mainly from the social peripheries, not from the political centres of nation-states and international institutions. A new ‘living law’¹⁴ growing out of fragmented social institutions which had followed their own path to the global village seems to be the main source of global law.”¹⁵ Thus, similar to globalization itself, social sources have led the transnationalization of the legal field, largely independent from states and international politics.¹⁶ Examples of autonomous global law are numerous, and include, internal legal regimes of multinational enterprises; international standards developed by non-governmental organizations, such as the International Organization for Standardization

¹⁰ *Ibid.*

¹¹ For example, the *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2 (entered into force 1 January 1994); and the *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. (entered into force 1 January 1948).

¹² *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 U.N.T.S. 38, Can. T.S. 1986 No. 43 [the New York Convention].

¹³ Nowrot, “Global Governance”, *supra* note 5 at 14.

¹⁴ Teubner, *supra* note 4 at 7, notes that Eugen Ehrlich’s notion of ‘living law’ describes how the earliest forms of ‘law’ have arisen not from the state, but from society itself. For example, earliest forms of *lex mercatoria* during medieval periods based on customs, habits and practices of local merchants developed prior to the creation of an inter-state system, following the peace treaties of Westphalia in 1648.

¹⁵ *Ibid.*

¹⁶ Giddens, Anthony, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990).

(“ISO”);¹⁷ rules of international sport federations, including the International Olympic Committee; and transnational contracting.¹⁸

Despite this, there are two primary obstacles to recognizing the legitimacy of these various forms of global law as positive law in their own right. First, positivist theories of law which stress the structural coupling of the state and the law assume that all other forms of legal pluralism are non-law or merely normative phenomena.¹⁹ Thus, any claim purporting that global law is anational or that it has developed without any linkage to a national legal order, cannot succeed. However, such archaic legal theories have little relevance for understanding current decentred law-making patterns at the level of a global society.²⁰ Second, the state-centric doctrine of international legal personality, which determines who possesses rights and duties enforceable under international law, only recognizes states as “subjects” or legal persons under international law.²¹ In contrast, nonstate entities, such as transnational corporations and non-profit non-governmental organizations, are assigned the invisible status as *de jure* “objects”,²² despite evidence of their

¹⁷ The ISO defines itself as a “non-governmental organization” even though its member national standards institutes are either part of the governmental structure of their respective states, or are mandated by their governments (International Organization for Standardization, “About the ISO”, online: <<http://www.iso.org/iso/about.htm>>). This paper views the standards produced by the ISO as creating an autonomous legal order as they are primarily developed by the private sector, for use in the private sector.

¹⁸ Claire Cutler, *Private Power and Global Authority - Transnational Merchant Law in the Global Political Economy* (New York, NY: Cambridge University Press, 2003) at 40 and 242; Nowrot, “Global Governance”, *supra* note 5 at 6; Teubner, *supra* note 4 at 4.

¹⁹ Teubner, *ibid.* at 9.

²⁰ Luhmann, Niklas, *Das recht der Gessellschaft* (Frankfurt: Suhrkamp, 1993) cited in Teubner, *ibid.* at 6.

²¹ Cutler, *supra* note 18 at 37.

²² Cutler, *ibid.* at 195; Nowrot, Karsten, “Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law” (1998) 6 *Indiana Journal of Global Legal Studies* 579 at 595 [Nowrot, “Status of NGOs”].

status as *de facto* subjects in practice.²³ As a consequence, the notion that a nonstate (invisible) entity could exercise global authority and participate in law-making becomes *non sequitur*.²⁴

Because of these conceptual barriers, Teubner notes that only reformulated theories of legal pluralism, which deconstruct the hierarchy of norm production and place political, legal and social law production on a level playing field, will adequately explain the present globalization of law.²⁵ If global sports law is going to be understood as positive law in its own right, as opposed to an “ensemble of social norms which can be transformed into law only by the juridical decisions of nation-states”,²⁶ it becomes necessary to examine alternative ways of conceptualizing the existence of an autonomous transnational legal order.

C. *Lex Mercatoria* as an Autonomous Transnational Legal Order

1. Introduction

As Teubner notes, “*lex mercatoria*, the transnational law of economic transactions, is the most successful example of global law without a state.”²⁷ It is only fitting, then, that it be used as the paradigmatic example of a transnational legal order for the purposes of determining whether global sports law may be similarly regarded as such. The remaining part of this section will

²³ For example, non-governmental organizations frequently participate in international decision-making processes concerning the codification and development of international law, particularly in the areas of environmental law and human rights law. Such participation can take the form of contributing to the development of new international conventions, acting as official state delegations in treaty negotiations, and acting as a consultant for intergovernmental organizations: Nowrot, *ibid.* at 593 to 595.

²⁴ Cutler, *supra* note 18 at 3.

²⁵ Teubner, *supra* note 4 at 11.

²⁶ *Ibid.* at 8.

²⁷ *Ibid.* at 3.

examine the origins of *lex mercatoria*, the debate surrounding its status as an emerging global order, and its application to Teubner's theory of global legal pluralism.

2. A Brief History of *Lex Mercatoria*

The long history of *lex mercatoria* may be divided into three distinct phases.²⁸ In its earliest medieval phase, *lex mercatoria* consisted of a set of autonomous merchant customs in the form of trade usages and practices.²⁹ These customs allowed the merchant class to conduct commerce within and between states without any interference from local laws.³⁰ Eventually, these customs evolved into a set of precise written rules in the form of commercial instruments that could only be enforced in private merchant courts in the event of a dispute.³¹ This delocalized form of dispute resolution was characterized by informal rules and procedures and, thus, operated in a manner more akin to private arbitration than a court of law.³²

During its second phase, following the Westphalian order and the introduction of a state-based international system,³³ *lex mercatoria* became nationalized as states became involved in the regulation of international commerce by adopting their own domestic commercial law.³⁴ Cross-border disputes between domestic and foreign commercial actors were resolved in state courts in accordance with the conflict of laws rules of private international law, which operated to localize

²⁸ See Cutler, *supra* note 18.

²⁹ Mazzacano, P. "The *Lex Mercatoria* as Autonomous Law", (2008) 4:6 Comparative Research in Law and Political Economy 1 at 3.

³⁰ *Ibid.*

³¹ Cutler, *supra* note 18 at 207.

³² *Ibid.*

³³ See *supra* note 14.

³⁴ Cutler, *supra* note 18 at 208.

disputes in a single national legal order.³⁵ By the end of this phase, however, a patchwork of national trade laws emerged, creating difficulties for the regulation of international commercial relations.³⁶

Accordingly, the third phase of *lex mercatoria* was characterized by the global unification efforts of both state and nonstate actors, which were designed to harmonize and globalize international commercial law.³⁷ Such unification efforts began in the sphere of public international law and took the form of a number of binding international treaties.³⁸ More recently, however, unification efforts have surfaced in the private sphere in the form of non-binding model laws, standardized contracts, and statements of principles,³⁹ thus demonstrating a re-emergence of a private ordering of commercial relations that grants maximum scope to merchant autonomy and flexibility,⁴⁰ reminiscent of the medieval law merchant. Further, this final phase is also characterized by the return of private dispute settlement in the form of delocalized commercial arbitration, hence, reinforcing the privatization or de-nationalization of international commercial relations.⁴¹

³⁵ Freidrich K. Juenger, “The Lex Mercatoria and Private International Law”, (2000) 60 La. L. Review 1133 at 1136.

³⁶ Cutler, *supra* note 18 at 209.

³⁷ *Ibid.*

³⁸ For instance, the Convention on the Limitation Period in the International Sale of Goods (New York, 1974); the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978); the United Nations Convention on Contracts for the International Sale of Goods (“Vienna Sales Convention”, Vienna, 1980); the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988) and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991): all referenced in *ibid.* at 215.

³⁹ Mustill, Rt. Hon. Lord Justice, “The New Lex Mercatoria: The First Twenty-five Years” (1988) 4:2 Arbitration International 86 at 108. See for example, the International Institute for the Unification of Private Law (“UNIDROIT”) and its restatement of Principles of International Commercial Contracts: Cutler, *supra* note 18 at 219.

⁴⁰ Cutler, *ibid.*

⁴¹ Mazzacano, *supra* note 39 at 14.

In summary, the history of *lex mercatoria* has been characterized by fluctuations in its autonomy. Despite a period of state-based interference into its self-regulating status, *lex mercatoria* has returned to its medieval roots as a self-contained and self-applying system of anational economic law;⁴² making it relevant for the study of other forms of global law similarly claiming to exist and operate outside the bounds of any national sovereign.

3. The Debate Surrounding *Lex Mercatoria*

The debate surrounding the legitimacy of *lex mercatoria* as an autonomous system of private law-making that is independent of national law is long standing.⁴³ However, the positions taken by scholars on both sides of the debate have been criticized for several reasons; specifically, their reliance on antiquated theories of legal positivism, and their failure to create room for theories of global legal pluralism which may better account for decentred law-making processes.⁴⁴ On one side of the debate are European scholars, predominantly French, who contend that *lex mercatoria* qualifies as an emerging global legal order.⁴⁵ Teubner notes that the theoretical arguments cited by such scholars follow several lines of reasoning, two of which are introduced below for their relevancy to global sports law, to be discussed in Part Three of this paper.

The first line of thought concerns the notion that *lex mercatoria* exists and operates under theories of customary law.⁴⁶ For example, the voluntary acceptance by commercial actors of

⁴² Mertens, Hans-Joachim, “*Lex Mercatoria: A Self-applying System Beyond National Law?*”, in Gunther Teubner (ed.) *Global Law Without a State* (Bookfield, Vermont: Dartmouth Publishing, 1997) at 33; Michaels, Ralf, “The True Lex Mercatoria: Law Beyond the State” (2007) 14 *Indiana Journal of Global Legal Studies* 447.

⁴³ For a general summary on this debate, see Teubner, *supra* note 4; Cutler, *supra* note 18 at 40 to 52; Mazzacano, *supra* note 29 at 2; and Mustill, *supra* note 39.

⁴⁴ Cutler, *ibid.* at 3; Teubner, *ibid.* at 9.

⁴⁵ Mazzacano, *supra* note 29 at 2; Teubner, *supra* note 4 at 9.

⁴⁶ Teuber, *ibid.*

non-binding model clauses, statements of principles and standardized contracts, all of which are formulated on the basis of international trade custom, has been described as a form of “international commercial custom”.⁴⁷ In this regard, Cutler notes that *lex mercatoria* operates in a manner analogous to public international law.⁴⁸ Further, she adds that, in some cases, these customary rules are being adopted by states into national legal systems, thus illustrating a process of “localized globalism”.⁴⁹ However, Teubner is critical of such theories, mainly due to their inability to conceptualize *lex mercatoria* as a form of positive-law making,⁵⁰ and the lack of empirical evidence to support their validity.⁵¹

The second line of reasoning relied upon by advocates of the *lex mercatoria* involves the notion that there exists a single society or overarching corporation (a “*droit corporatif*”) of global commercial actors.⁵² Theoretically, such a society would produce its own “inner law of associations” through the mechanism of membership, which would include codes of conduct and organizational sanctions, such as exclusion from membership.⁵³ In this regard, the *droit corporatif* resembles early merchant guilds and their respective statutes which were binding on all merchants who traded within a region.⁵⁴ However, Teubner questions the applicability of

⁴⁷ Cutler, *supra* note 18 at 219.

⁴⁸ *Ibid.* at 40.

⁴⁹ Cutler, *ibid.* at 20, describes Santos’s notion of “localized globalism” as a process whereby “states are subjected to increasing discipline from legal regimes developed by international, transnational, and global organizations”. For a discussion the operation of localized globalism in sport, see Part Three of this paper.

⁵⁰ Teubner, *supra* note 4 at 17.

⁵¹ Bermann, Harold, J., “The law of international commercial transactions (*lex mercatoria*)” in W.S. Surrey and D. Wallace, jr (eds.), *Lawyer’s Guide to International Business Transactions: The Law of International Commercial Transactions (Lex Mercatoria)* (Philadelphia: American Law Institute/American Bar Association, 1983) cited in *ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Greif, A., Milgrom, P., & Weingast, B.R., “Coordination, Commitment, and Enforcement: The Case of the Merchant Guild” (1994) 102:4 *The Journal of Political Economy* 745.

such a theory in the competitive context of world markets where it is unlikely that any common association of commercial actors could exist to discipline its members.⁵⁵

Located on the other side of the debate are Anglo-American scholars who reject the notion of *lex mercatoria* as a self-applying, non-national body of law.⁵⁶ For these scholars, who are avid believers in legal positivism, the structural coupling of law and state territoriality is so strong that the notion of anational law amounts to a fallacy. As Malanczk notes, “there is no such thing [as] transnational law. No legal order exists above the various national legal systems to deal with transborder interactions between individuals.”⁵⁷ It is from this state-centric perspective that opponents of *lex mercatoria* challenge its legitimacy in two main ways. First, if the source of *lex mercatoria* is alleged to be contractual, the contract must be rooted in a national legal order, since a ‘stateless’ contract cannot exist.⁵⁸ The ability of economic actors to contractually arrange the terms of a transaction, including a provision for the private resolution of disputes, is merely an extension of domestic legal systems which grant freedom of contract.⁵⁹ Simply put, a contractual legal order cannot exist without the authorization of the state. Second, the customs or rules of *lex mercatoria* can never obtain the status of binding law, since a private legal order does not possess the exclusive territory or coercive powers of a sovereign state.⁶⁰ As a result, such customs or rules can only be enforced through the legal machinery of the state.⁶¹ For

⁵⁵ Teubner, *supra* note 4 at 18.

⁵⁶ Cutler, *supra* note 18 at 41; Mazzacano, *supra* note 29 at 1; Teubner, *ibid.* at 10.

⁵⁷ Malanczk cited in Cutler, *ibid.* at 46.

⁵⁸ Teubner, *supra* note 4 at 18.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Mazzacano, *supra* note 29 at 2.

example, national courts are still necessary part of the enforcement of foreign commercial arbitration awards.⁶²

4. Creating a New Socio-Legal Theory to Explain the Existence of Global Law

In an attempt to breathe new life into the *lex mercatoria* debate, Teubner has sought to create a new theory of global legal pluralism⁶³ that can describe the transnationalization of law on a non-political and non-national basis.⁶⁴ The core principle underlying this theory is the belief that *lex mercatoria* operates as a self-contained and self-validating legal order.⁶⁵

Three key assumptions form the basis of Teubner's theory. First, *lex mercatoria* refers to the individual contract between commercial actors, whether based on standard form or model law.⁶⁶

The second assumption concerns traditional theories of legal sources, which provide that only a national legal order can be the source of validity for a contract.⁶⁷ This would mean, however, that a "global contract", by definition, cannot exist if it claims not to be rooted in a national legal order. To avoid this, Teubner defines contracting as its own source of law, one that is on equal footing with judge-made law and legislation.⁶⁸ The last assumption relates to theories of legal legitimacy. Teubner rejects the notion that a public legal order is required to authorize and enforce private contractual arrangements. Instead, he argues that private legal orders are "self-

⁶² Cutler, *supra* note 18 at 226.

⁶³ Teubner, *supra* note 4 at 14, defines "legal pluralism" as a "multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal".

⁶⁴ *Ibid.* at 12.

⁶⁵ *Ibid.*

⁶⁶ Mustill, *supra* note 39 at 92, labels this "micro *lex mercatoria*".

⁶⁷ Teubner, *supra* note 4 at 18.

⁶⁸ *Ibid.*

validating” or “self-legitimizing” in their own right, and thus can operate in a manner truly insulated from the state.⁶⁹

In combining these three assumptions, Teubner introduces his conceptualization of *lex mercatoria* as follows:

[L]ex mercatoria . . . is the practice of contracting that transcends national boundaries and transforms a merely national law production into a global one – numerous international business transactions, standardized contracts of international professional associations, model contracts of international organizations and investment projects in developing countries. However, as soon as these contracts claim transnational validity, they cut off not only their national roots but their roots in any legal order.⁷⁰

From here, Teubner goes on to note that the separation of a global contract from its national legal order is not fatal to its validity, as it becomes its own source of law through a process of self-validation.⁷¹ However, he acknowledges that this validation process ultimately leads to the paradox of “self-referencing” – essentially, a tautology used by parties to prove the validity of their agreement (“We agree that our agreement is valid”).⁷² However, such a paradox is not fatal to Teubner’s theory of a global contract. He notes that there are three means of “de-paradoxification” which enable a global contract to exist without the authority of a national legal order.⁷³

The most persuasive method of de-paradoxification cited by Teubner is the technique of “externalization”, whereby a contract avoids the problem of self-validation by referring

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* at 15.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.* at 17.

conditions of its legitimacy and future conflicts to external arbitration.⁷⁴ The relevant arbitration tribunal (or quasi-court) is then able to judge the validity of the contract.⁷⁵ The externalization process is further extended where a contract makes reference to a quasi-legislative institution, for example, in the commercial context, the International Chamber of Commerce (“ICC”) or the International Law Association.⁷⁶ In this regard, global contracting creates, spontaneously and out of nothing, “an institutional triangle of private ‘adjudication’, ‘legislation’ and ‘contracting’”, which enables *lex mercatoria* to develop into an official legal order that produces law in a manner functionally equivalent to that of a national legal order.⁷⁷

5. Measuring the Legitimacy of *Lex Mercatoria* as an Autonomous Global Legal Order

Under Teubner’s theory of global legal pluralism, one is able to measure the extent to which *lex mercatoria*, or other types of global law, operates as a self-contained and self-maintaining legal order. Teubner notes that all “self-reproductive legal systems comprise interactional episodes that are linked to each other in a second communicative circle (precedents, legal doctrine, codification).”⁷⁸ Thus, in order to determine whether a type of global law will develop, or is developing, into an autonomous order, it is necessary to examine the relative strength of its episodic links.⁷⁹

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ Schmitthoff, Clive, M., “Schmitthoff’s Expert Trade: The Law and Practice of International Trade, (9th ed.) (London: Steve, 1990), cited in *Ibid.* Information on the International Law Association in London may be found online: <<http://www.ila-hq.org/>>.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at 19.

⁷⁹ *Ibid.*

Lex mercatoria is a good example of a legal order that produces strong episodes, but that has difficulty linking them together.⁸⁰ For example, with respect to codification in standard forms, Mustill notes that the diversity of sophisticated standardized contracts, both within and between institutions, essentially precludes homogeneity within a single trade; thus resulting in fragmented “para-legal systems”.⁸¹ Similarly, Teubner notes that in the context of investment projects in developing countries, the multitude of sophisticated contractual regimes that exist, despite being strong episodically, are not connected in any meaningful way, resulting in a “patchwork of legal regimes”.⁸²

With respect to arbitration, commercial arbitration bodies are similarly strong in producing episodes, but relatively weak in connecting them. As commercial arbitration awards are increasing published, there is some evidence of a *de facto* doctrine of precedent emerging.⁸³ However, Teubner is quick to note that there are several structural barriers to the systematic development of a genuine “case law” in commercial arbitration, notably the lack of a judicial hierarchy of arbitration tribunals which could provide normative consistency in arbitral decision-making. Therefore, until such institutional changes occur, any development of precedent will be necessarily based on a *de facto* doctrine of “horizontal” (rather than “vertical”) *stare decisis*. Indeed, such a process would be facilitated by the existence of a reputational hierarchy consisting of the most commonly used commercial arbitration tribunals.⁸⁴

⁸⁰ *Ibid.* at 20.

⁸¹ Mustill, *supra* note 39 at 94 and 95.

⁸² Teubner *supra* note 4 at 20.

⁸³ See Kaufmann-Kohler, Gabrielle, “Arbitral Precedent: Dream, Necessity or Excuse?” (2007) 23:3 *Arbitration International*.

⁸⁴ Cutler, *supra* note 18 at 228, notes that the main commercial arbitration tribunals are the ICC Court of Arbitration, the American Arbitration Association, and the London Court of Arbitration.

Finally, the linkage between adjudicational episodes and quasi-legislative institutions is relatively weak in *lex mercatoria*.⁸⁵ At best, reference will only be made in arbitration decisions to the quasi-legislators of private commercial regimes, such as the ICC, or economic and professional associations.⁸⁶ Teubner notes that this weakness is unsurprising since the notion of a political link between adjudicational episodes and legislative-parliamentary bodies is more applicable to nation states.

To conclude, Teubner's theory of global legal pluralism is able to explain the existence of *lex mercatoria* as a self-contained and self-validating contractual system. Its greatest strength lies in its ability to remedy the shortcomings of positivist theories of law that have dominated the *lex mercatoria* debate, and which have become antiquated in the current transnationalization and decentralization of the legal field. A theory of global pluralism will be relevant in analyzing the existence, validity and autonomy of other emerging private legal orders, such as global sports law.

II. ARCHITECTURE OF THE INTERNATIONAL SPORT SYSTEM

A. Overview

Modern conceptions of global law adopt a pluralistic understanding of legal subjects and sources of law. As Cutler notes, "the pluralism of subjects has created 'a spaghetti bowl or spider's web of intertwined organizations and arrangements which evade traditional categories of private and

⁸⁵ Teubner, *supra* note 4 at 21.

⁸⁶ *Ibid.*

public, national and international law,’⁸⁷ while ‘emerging forms of global governance are characterized by the fragmentation of the public sphere into complex multilayered network of interacting institutions and bodies’⁸⁸.⁸⁹ This plurality of subjects and authority is reflected in the structure and governance of the international sport system, which, although predominantly private, involve a network of public and private bodies at the international and national levels.

The following section outlines the various institutions, bodies and instruments that comprise the three main orders of the international sport system; namely, the Olympic Movement, the technical rules of sports, and the anti-doping movement. The section concludes with a discussion of how delocalized sport-specific arbitration, both nationally and internationally, has been created to resolve disputes arising in these three areas.

B. The Olympic Movement

The Olympic Movement is a globally organized action comprising entities and individuals that collaborate to promote the philosophy and values of modern Olympism⁹⁰ and to bring together the world’s athletes at the Olympic Games and other international sporting games held under the patronage of the International Olympic Committee (the “IOC”).⁹¹

⁸⁷ Picciotto, Sol, “Introduction: What Rules for the World Economy?” in Picciotto and Mayne (eds.) *Regulating International Business: Beyond Liberalization* (Basingstoke: The MacMillan Press, 1999) at 9, cited in Cutler, *supra* note 18 at 22.

⁸⁸ *Ibid.*

⁸⁹ Cutler, *supra* note 18 at 22.

⁹⁰ Modern Olympism was conceived by Pierre de Coubertin in June 1894: Olympic Charter, *infra* note 89 at Preamble. It “is a life philosophy which draws together sport, culture and education in the aim of creating a harmonious balance between body, will and mind: International Olympic Committee, “The Olympic Movement”, 2nd ed., online: <http://multimedia.olympic.org/pdf/en_report_670.pdf>.

⁹¹ Olympic Charter, Fundamental Principles. Other sporting games patronized by the IOC, include: the Commonwealth Games, the Paralympic Games, the Pan American Games, the Asian Games, and the Summer and Winter Youth Olympic Festivals.

The Olympic Charter⁹² is the supreme law of the Olympic Movement.⁹³ Where the Olympic Charter conflicts or contradicts with the statute of one of its constituents, the former takes precedence.⁹⁴ The Olympic Charter also serves as the statutes of the IOC.⁹⁵

The Olympic Movement is comprised of four main constituents: the IOC, International Sport Federations, national Olympic committees, and Organizing Committees for the Olympic Games.⁹⁶ Governments and other public entities cannot be members of the Olympic Movement.⁹⁷

1. The International Olympic Committee

The IOC is the supreme authority of the Olympic Movement.⁹⁸ It is an international non-governmental not-for-profit organization, of perpetual duration, that is recognized by the Swiss Federal Council as a legal person.⁹⁹ Its legal seat is in Lausanne, Switzerland.¹⁰⁰ It is the

⁹² *The Olympic Charter*, International Olympic Committee, in force as from 7 July 2007 [Olympic Charter].

⁹³ The Olympic Charter was created by the IOC. The last edition of the Charter entered into force on 1 September 2004, and has since been amended by the IOC in accordance with the 119th IOC Session in Guatemala on 7 July 2007. The Charter serves as a basic instrument of a constitutional nature that sets out the Fundamental Principles and essential values of Olympism: *ibid*, Introduction to the Olympic Charter.

⁹⁴ See *e.g.* with respect to the statutes of National Olympic Committees: Olympic Charter, *supra* note 92, at BLR 28-29.1.3.

⁹⁵ Olympic Charter, *ibid*.

⁹⁶ The IOC recognizes other organizations as affiliated with the Olympic Movement, for example, the International Paralympic Committee.

⁹⁷ A condition for belonging to the Olympic Movement is recognition by the IOC. No provision is made for the recognition of public bodies or government organizations in the Olympic Charter: see Olympic Charter, *supra* note 92, at Rule 3.

⁹⁸ *Ibid.* at Rule 1.1.

⁹⁹ The IOC's legal status arises from an agreement entered into with the Swiss Federal Council on November 1, 2000: *Ibid.* at Rule 15.1.

¹⁰⁰ *Ibid.* at Rules 15.1 and 15.2.

exclusive owner of the Olympic Games and all trademarks, copyrights, and other intangible properties associated with the Olympic Games.¹⁰¹

The IOC recruits and elects its own members, who are natural persons.¹⁰² Members of the IOC include active athletes, presidents or executives of international sport federations and national Olympic committees,¹⁰³ but the majority of members are not linked to any specific function or office.¹⁰⁴ Importantly, each IOC member is a representative of the IOC in their own country, rather than a delegate of a country to the IOC.¹⁰⁵ Further, no member is permitted to accept from his or her own government, any mandate or instructions that would interfere with his or her freedom to act or vote for the IOC.¹⁰⁶

Under the Olympic Charter, the IOC is assigned several roles, responsibilities and powers. A central role is the protection of the independence of the Olympic Movement.¹⁰⁷ The IOC's powers are exercised by its two main organs: the Session and the IOC Executive Board. The IOC Session is the general assembly of the members of the IOC, and is responsible for the election of a city to host the Olympic Games,¹⁰⁸ the selection of sports for the Olympic programme, and the criteria for the inclusion of any sport in the Olympic programme.¹⁰⁹ The IOC Executive Board is composed of the President, four Vice-Presidents and ten other

¹⁰¹ *Ibid.* at Rule 7.

¹⁰² *Ibid.* at Rule 16.1.2.

¹⁰³ The IOC has strongly rejected broader representation of National Olympic Committees within its membership on the basis that it would result in “a further consolidation of political camps within the Olympic movement along the lines of the United Nations General Assembly”: Barrie Houlihan, *Sport and International Politics* (Toronto: Harvester Wheatsheaf, 1994) at 64.

¹⁰⁴ Olympic Charter, *supra* note 92 at Rule 16.1.1.1.

¹⁰⁵ *Ibid.* at Rule 16.1.4.

¹⁰⁶ *Ibid.* at Rule 16.1.5.

¹⁰⁷ *Ibid.* at Rule 2.5.

¹⁰⁸ *Ibid.* at Rule 34.1.

¹⁰⁹ *Ibid.* at Rule 46.3.

members.¹¹⁰ Broadly speaking, the Executive Board is responsible for the administration of the IOC and the management of its affairs.¹¹¹ More specifically, it is responsible for deciding which specific disciplines or events of a sport will be included in the Olympic programme.¹¹² The decisions of the Session and the IOC Executive Board are final, except for any appeal that may be available to the Court of Arbitration for Sport.¹¹³

2. International Sport Federations

International Sport Federations (“IFs”) are international non-governmental organizations that are responsible for administering one¹¹⁴ or several¹¹⁵ sports at the world level. The vast majority of IFs are private associations under the laws of a European country, predominantly Switzerland.¹¹⁶ Each IF is responsible for the technical control and direction of its sport at the Olympic Games.¹¹⁷

To be included in the IOC Movement, an IF must meet two requirements. First, an IF must be recognized by the IOC as the governing federation of one or more sports.¹¹⁸ Presently, there are close to 100 IFs;¹¹⁹ however, the IOC only formally recognizes 66 IFs, and only 33 of those are

¹¹⁰ *Ibid.* at Rule 19.1.

¹¹¹ *Ibid.* at Rule 19.3.

¹¹² *Ibid.* at Rule 46.4.

¹¹³ *Ibid.* at Rule 15.5. For further discussion on the Court of Arbitration for Sport, see *infra* note 267 and the accompanying discussion.

¹¹⁴ For example, the international federation of football (soccer) (Fédération Internationale de Football Association).

¹¹⁵ For example, Fédération Internationale de Natation is the IF responsible for administering swimming, diving, synchronized swimming and water polo.

¹¹⁶ As an exception, the International Association of Athletics Federation is an association under the laws of Monaco (Act No. 1072 of 27 June 1984): IAAF Constitution, Article 1.

¹¹⁷ Olympic Charter, *supra* note 92 at Rule 47.1.

¹¹⁸ *Ibid.* see “Fundamental Principles”.

¹¹⁹ This figure is based on an estimate since 87 IFs are members of Sport Accord (previously, the General Association of International Sports Federations), however there may be IFs that do not belong to Sport Accord.

IFs of sports included in the Olympic programme.¹²⁰ Second, the statutes, practices and activities of an IF must be in conformity with the Olympic Charter.¹²¹

Subject to certain responsibilities and roles mandated by the Olympic Charter, IFs are largely independent from the IOC and therefore have autonomy over the administration of their respective sports. For example, eligibility criteria for participation in the Olympic Games must be approved by the IOC;¹²² however, the application of that criteria lies with the IF and its affiliated national sport federations and national Olympic committees (see below).¹²³

IFs within the Olympic Movement have organized themselves into four main associations:¹²⁴ the SportAccord (previously known as the General Association of International Sports Federations)¹²⁵, the Association of Summer Olympic International Federations (“ASOIF”)¹²⁶, the Association of International Olympic Winter Sports Federations (“AIOWF”)¹²⁷, and the Association of the IOC Recognised International Sports Federations (“ARISF”).¹²⁸

¹²⁰ International Olympic Committee, “List of Olympic Sports”, online: <<http://www.olympic.org/en/content/Sports/>>.

¹²¹ Olympic Charter, *supra* note 92 at Rule 26.

¹²² *Ibid.* at Rule 27.1.1.5 and BLR 41.1.

¹²³ *Ibid.* at BLR 41.2.

¹²⁴ Houlihan argues that the weakness of individual IFs combined with their desire to protect their autonomy over their sports from the IOC has led to the development of these representative bodies: Houlihan, *supra* note 103 at 61 and 65.

¹²⁵ SportAccord was founded at the General Association of International Sports Federations in 1967. Its headquarters are in Lausanne, Switzerland: online: <<http://www.agfisonline.com/>>.

¹²⁶ The ASOIF was created in 1983 and its General Secretariat is located in Lausanne, Switzerland. The ASOIF is composed of 28 IF members: online: <<http://www.asoif.com>>.

¹²⁷ The AWOIF’s was founded in 1970, and its headquarters are located in Lausanne, Switzerland.

¹²⁸ The ARISF was created in 1983 and its IF members, although recognized by the IOC, do not govern sports included in the Olympic programme: online: <<http://www.arisf.org>>.

Each IF is comprised of national sport organizations (“NSOs”) or national governing bodies, which are responsible for administering one or more sports at the national level.¹²⁹ Most NSOs are organized as private, not-for-profit corporations. In order to be recognized as an NSO, a sport association must comply with the rules of its respective IF (see “Technical Rules of Sport”). Further, in order to participate in the Olympic Games or any other sporting games under the patronage of the IOC, an NSO must also comply with the Olympic Charter.¹³⁰ Each NSO governs the regional or provincial sport organizations in their respective countries.¹³¹

3. National Olympic Committees

National Olympic committees (“NOCs”) are representatives of the IOC in a participating nation.¹³² NOCs are all private, not-for-profit corporations.¹³³ NOCs carry out several specific roles and functions related to the Olympic Movement, three of which are noteworthy. First, NOCs have the exclusive authority to represent their respective countries at the Olympic Games

¹²⁹ Technically speaking, each IF is comprised of “National Sport Federations”. For example, the Aquatics Federation of Canada is the governing body for swimming, diving, water polo and synchronized swimming. However, the Aquatics Federation is merely a shell for the “National Sport Organizations” that represent each of these sports. For instance, Swimming/Natation Canada is the National Sport Organization for swimming and is solely responsible for administering swimming in Canada and maintaining an affiliation with FINA, the IF for swimming. Therefore, where an IF governs two or more sports (such as FINA), one may distinguish between a national sport *federation* and a national sport *organization*. However, as a matter of convenience, this paper will only refer to a national sport organizations (“NSOs”) when discussing the governance of a sport at the national level.

¹³⁰ Rule 30 of the Olympic Charter, *supra* note 92, states that a national sport federation may only be recognized by its respective National Olympic Committee if it is governed by and complies with the Olympic Charter. Since National Olympic Committees have the ultimate authority for selecting athletes to the Olympic Games, recognition by a National (and compliance with the Olympic Charter) are necessary preconditions for a national sport federation’s participation in the Olympic Games.

¹³¹ For example, Swim/Natation Canada, the NSO for swimming in Canada, governs Provincial Sport Organizations (PSOs), who in turn administer sport at the provincial level. For further discussion on the regulatory hierarchy of individual sports, see *infra* note 154 and the accompanying discussion on the “Technical Rules of Sport”.

¹³² Houlihan, *supra* note 103 at 63.

¹³³ NOCs may be incorporated under the general company legislation of a country, or by charter. The Canadian Olympic Committee, for example, was incorporated under Part II of the *Companies Act, 1934*, chapter 33 of the Statutes of Canada. In contrast, the United States Olympic Committee was chartered and granted monopoly status under the *Amateur Sport Act*, 36 U.S.C. Sec. 220501 et seq. of the United States Code [US Amateur Sport Act].

and at any other sporting games patronized by the IOC.¹³⁴ Second, NOCs decide upon the entry of athletes to the Olympics or other sporting games patronized by the IOC, as proposed by their respective national sport organizations.¹³⁵ In Canada, for example, the selection of athletes to the national Olympic Team is determined by a selection agreement containing eligibility criteria that is negotiated by the Canadian Olympic Committee and each NSO. Third, NOCs have the exclusive authority to select and designate a city in their respective countries to apply to organize and host the Olympic Games.¹³⁶

Similar to IFs, NOCs must comply with the Olympic Charter and their statutes are subject to the approval of the IOC.¹³⁷

Presently, there are 205 NOCs,¹³⁸ all of which belong to the Association of National Olympic Committees (“ANOC”). ANOC is further divided into five continental associations.¹³⁹

The members of each NOC must include the IOC members in their country, representatives from national sport organizations affiliated with IFs governing sports included in the Olympic programme, and active or retired Olympic athletes.¹⁴⁰

As representatives of the IOC, NOCs are required to preserve their autonomy and independence from their respective national governments.¹⁴¹ Further, where the constitution, laws or

¹³⁴ Olympic Charter, *supra* note 92 at Rule 28.3.

¹³⁵ *Ibid.* at Rules 28.3, 28.7.7.2 and 45.3.

¹³⁶ *Ibid.* at Rule 28.4.

¹³⁷ *Ibid.* at Rule 3.3 and BLR 28 and 29.1.3.

¹³⁸ International Olympic Committee, “National Olympic Committees”, online: <http://www.olympic.org/en/content/The-IOC/Governance/National-Olympic-Committees/>.

¹³⁹ List 5 continental associations are the Pan American Sports Association (“PASO”), the Association of National Olympic Committees of Africa (“ANOCA”), the Olympic Council of Asia (“OCA”), the European Olympic Committees (“EOC”), and the Oceania National Olympic Committees (“ONOC”).

¹⁴⁰ Olympic Charter, *supra* note 92 at Rule 29.1.

regulations of country of a NOC causes the activity of the NOC “to be hampered”, the IOC may suspend or withdraw the recognition of that NOC.¹⁴² Governments or other public authorities are not permitted to designate any members of a NOC (but a NOC may decide, at its discretion, to elect as members, representatives of such public authorities).¹⁴³

4. Organizing Committees of the Olympic Games

Once a city has been selected to host the Olympic Games, the Olympic Charter requires the NOC of that country to establish an Organizing Committee (“OCOG”) and to incorporate it under the laws of that country.¹⁴⁴ The OCOG is responsible for staging the Olympic Games and complying with its obligations under the Host City Agreement, to which the IOC is a party. The OCOG is closely linked to its local, regional and national governments to facilitate the organization of the Olympic Games.¹⁴⁵ At any given time, the IOC is working with three to four OCOGs of future Olympic Games.¹⁴⁶

5. National Governments

The role of national governments in the Olympic Movement is very limited. Most states have recognized the private autonomy of the Olympic Movement and, as a result, have deferred to the

¹⁴¹ Generally, see *ibid.* at Rule 28.6.

¹⁴² *Ibid.* at Rule 28.9.

¹⁴³ *Ibid.* at Rule 29.4.

¹⁴⁴ *Ibid.* at Rule 36. For example, the Vancouver Olympic Organizing Committee is a not-for-profit corporation incorporated under Part II of the *Canada Corporations Act*.

¹⁴⁵ For instance, for the 2012 Winter Olympic Games, a multi-party agreement was entered into by Canada, British Columbia, Whistler, the Canadian Olympic Committee, the Vancouver Olympic Organizing Committee (“VANOC”) and the corporation responsible for submitting Vancouver’s international bid for the Olympic Games (“Bid Corp”), that set out the commitments and roles of each party in the staging of the Games.

¹⁴⁶ Jean-Loup Chappelet & Brenda Kubler-Mabbott, *The International Olympic Committee and the Olympic System - The governance of world sport* (New York, NY: Routledge, 2008) at 6.

authority of the Olympic Charter and the IOC to govern the Olympic Movement. In some countries, such as Canada, Germany and the United Kingdom, deference to the regulatory autonomy of the international non-governmental bodies that comprise the Olympic Movement is illustrated by the absence of legislation governing domestic sport bodies; whereas, other countries, such as the United States,¹⁴⁷ France,¹⁴⁸ Greece¹⁴⁹ and Malaysia,¹⁵⁰ have incorporated the privatized regulatory hierarchy of the Olympic Movement into their legislation.

The primary role of national governments within the Olympic Movement, and one that is expressly recognized in the Olympic Charter, relates to a government's application to host the Olympic Games in one of their cities. National governments of a city applying to host the Olympic Games must submit a legally binding instrument providing that the government "undertakes and guarantees that the country and its public authorities will comply with and respect the Olympic Charter".¹⁵¹ Further, the public authorities of the bidding city, along with its

¹⁴⁷ US Amateur Sport Act, *supra* note 133. Note specifically, the eligibility requirements of national governing bodies under s. 220521(c) which provides that although the United States Olympic Committee ("USOC") may recognize an organization as a national governing body of a sport, it may only "recommend" that organization to the appropriate IF, which has the ultimate authority of designating the organization as the official representative of the United States for that sport. Further, s. 220522(a)(5) and (6) provides that to be recognized by the USOC, a national governing body must demonstrate its autonomy in the governance of a sport and that it is a member of its respective IF. Also note, that prior to the enactment of the 1978 *Amateur Sports Act*, a President's Commission on Olympic Sports was created to reorganize the structure of amateur athletics in the United States. In the House Report, the Commission made it clear that the direction of amateur athletics should be designated to the USOC and national governing bodies, and not the federal government: Nelson, Vernon, "Butch Reynolds and The American Judicial System v. The International Amateur Athletic Federation - A Comment on the Need for Judicial Restraint" (1993) 3 *Seton Hall Journal of Sports Law* 173.

¹⁴⁸ See Law of 16 July 1984, as cited in André-Noël Chaker, *Study on national sports legislation in Europe* (Strasbourg, France: Council of Europe Publications, 1999) at 19.

¹⁴⁹ See Article 27 of Athletic Law 2725/99 as in force in Greek Sports Code, Vol. 1, p. 46, which provides that the rules of a national governing body should have regard to the application rules of its respective IF, and Article 33(6) which provides that an athlete is obliged to comply with the rules of the IOC related to doping.

¹⁵⁰ *Sport Development Act 1997*, Laws of Malaysia Act 576 [Malaysia Sport Development Act].

¹⁵¹ Olympic Charter, *supra* note 92 at Rule 34.3.

respective NOC, must guarantee that the Olympic Games will be organized to the satisfaction of and under the conditions required by the IOC.¹⁵²

C. The Technical Rules of Sport

The technical rules of a sport are governed outside of the Olympic Movement. The three constituent bodies forming the regulatory hierarchy within a specific sport are IFs, NSOs and regional or provincial sport organizations (“PSOs”). IFs are responsible for establishing the technical rules of their sport and ensuring compliance with those rules by their NSO members. An NSO’s main function is to agree with and apply the rules of the IF, organize events, and to assist in selecting national teams. The failure of an NSO to comply with the technical rules of an IF may result in the withdrawal of their provisional recognition as the governing body of a particular sport in their country.¹⁵³ As a consequence, the NSO and its athletes may no longer be able to participate in internationally sanctioned events (i.e., the World Championships or the Olympic Games). However, the NSO may be able to continue to administer their sport within their country and to organize nationally sanctioned sporting events.¹⁵⁴

Where non-compliance with an IF’s rules arises from the actions of an individual athlete, rather than the NSO itself, alternative sanctions may be imposed on the individual athlete, instead of the NSO as a whole. For instance, most IFs have adopted a “contamination rule” which provides

¹⁵² *Ibid.* at BLR 34.1.2.

¹⁵³ Notwithstanding this general rule, an NSO is able to create their own technical rules to be used solely in nationally sanctioned sporting events, as long as those rules do not conflict with the rules of their respective IFs. For example, following FINA’s preliminary ban on certain swimsuits in 2009, USA Swimming enacted more stringent rules that were to take effect months prior to those established by FINA: USA Swimming, “News Release”, online: <<http://www.usaswimming.org/USASWeb/ViewNewsArticle.aspx?TabId=0&Alias=Rainbow&Lang=en&ItemId=2647&mid=2943>>.

¹⁵⁴ This may not be the case for sport governing bodies in countries with legislation that prohibits a sport body from governing its sport altogether if it fails to comply with the rules of its IF or is no longer in good standing with its IF: see e.g. Malaysian Sport Development Act, *supra* note 150.

that where an individual athlete is deemed ineligible for violating an IF's rules, any otherwise eligible athlete that competes with or against that athlete, is also deemed ineligible.¹⁵⁵

As the third and lowest constituent in the regulatory hierarchy of sport, PSOs are accountable to their respective NSO and, by extension, to their respective IF. Where a PSO fails to comply with the technical rules of its NSO, the latter may fail to recognize that provincial organization.¹⁵⁶

D. The Anti-Doping Movement

The anti-doping movement represents the concerted action of international non-governmental and intergovernmental organizations and national governments to eliminate doping in international sport. Despite the financial and symbolic involvement of public authorities in the movement, which has undoubtedly strengthened the uniformity and legitimacy of anti-doping efforts, the administration of the movement largely remains privatized. As Erbsen notes, the anti-doping movement has effectively become “a privatized analogue to the criminal justice system that operates at or beyond the fringes of national legislative and judicial control”.¹⁵⁷ To appreciate this privatized structure, it is necessary to canvass the various roles and obligations of the various authorities within the anti-doping movement.

¹⁵⁵ For example, in 1990, Harry “Butch” Reynolds was found to have committed a doping offence contrary to the International Amateur Athletic Federation’s (“IAAF”) anti-doping rules and was suspended from competition. Despite this, the United States track and field governing body permitted Reynolds to compete at the 1991 national championships. In response, the IAAF, increased Reynolds suspension, and under its ‘contamination rule’, suspended five American athletes who had run against Reynolds: Houlihan, *supra* note 103 at 69.

¹⁵⁶ See e.g. *WTF Taekwondo Association of Canada v. Manitoba Taekwondo Association* (SDRCC 08-0082, 18 December 2008). The awards of the Sport Dispute Resolution Centre of Canada (“SDRCC”) are available online at: <<http://www.crdsc-sdrcc.ca>>.

¹⁵⁷ Erbsen, A., “The Substance and Illusion of Lex Sportiva” in Ian Stewart Blackshaw, Robert C. R. Siekmann & Janwillem Soek, eds., *The Court of Arbitration for Sport, 1984-2004* (The Hague: T.M.C. Asser Press, 2006) 441 at 446. For example, the Court of Arbitration for Sport has rejected an athlete’s argument that his doping sanction violated United States and European Union laws: *Guillermo Canas and ATP Tour*, CAS 2005/A/951 at 18 [*Canas*]. Also note that the standard of proof for determining whether a doping violation has occurred is distinctly a “comfortable satisfaction”. This standard of proof is greater than a mere balance of probabilities but less than proof beyond a reasonable doubt: WADA Code, *infra* note 164, at Article 3.1,

1. The World Anti-Doping Agency

The World Anti-Doping Agency (“WADA”) is located at the pinnacle of the anti-doping movement. It is a private law foundation that was established on November 10, 1999,¹⁵⁸ by notarial deed pursuant to Swiss law, and is thus subject to the oversight of Swiss authorities.¹⁵⁹ Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. It is composed of a Foundation Board, an Executive Committee, and several committees. The Foundation Board is the supreme decision-making authority of WADA. The Executive Committee is a policy-making body and is responsible for the actual management and administration of WADA.

WADA’s membership is comprised of an equal number of representatives from public authorities – including intergovernmental organizations, national governments and other public bodies – and international nongovernmental sport organizations within the Olympic Movement.¹⁶⁰ Government representation in WADA is allocated according to the five “Olympic

¹⁵⁸ Pound, Richard, “The World Anti-Doping Agency: An Experiment in International Law” (2002) 2 International Sports Law Review 53 at 54. As Pound notes, the seminal event behind the creation of WADA was a series of doping scandals involving the sport of cycling during the 1998 Tour de France. Following the scandal, there was a concern that the athletes caught doping would face criminal charges. However, the prospect that sport would become governed by the criminal law and the parallel intervention of national governments into sport that would accompany such regulation was viewed as undesirable by international sport community. In response to these events, the IOC convened a World Conference on Doping in February 1999, in Lausanne, Switzerland, involving members of the Olympic Movement, and representatives of governmental and international organizations (i.e. Interpol, the Council of Europe, the World Health Organization and the United Nations Drug Controls Program). Emerging from the World Conference was the “Lausanne Declaration” which set out the basic structure for WADA.

¹⁵⁹ As Pound, *ibid.* at 59, notes, the legal status of WADA has been the subject of some debate between private and public authorities since it does not conform to the legal format of intergovernmental organizations, such as the United Nations Educational, Scientific and Cultural Organisation (“UNESCO”), which are established by treaty. Initially, governments expressed a preference to turn WADA into a public body; however this would have had the effect of completely disregarding the private half of WADA’s governance structure. As a result, governments have reluctantly agreed to retain the current structure of WADA and see whether it is possible to operate through a hybrid organization.

¹⁶⁰ WADA, “WADA History”, online: <<http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=312>>.

Regions” as agreed upon by participating governments.¹⁶¹ The governments of each respective region are responsible for electing members to WADA, and notifying WADA of the appointments.¹⁶² The funding of WADA’s operations is shared equally between governments and the Olympic Movement.¹⁶³

The structure of WADA’s program is designed to ensure that international and national efforts to detect, deter and prevent doping in sport are harmonized, coordinated and effective, and it is divided into three levels: (1) the World Anti-Doping Code (“WADA Code”)¹⁶⁴, (2) International Standards, and (3) Models of Best Practice and Guidelines.¹⁶⁵ The WADA Code first entered into force on January 1, 2004, but was recently amended in 2009. It is mandatory for its signatories and provides the framework for harmonizing anti-doping policies and regulations within the Olympic Movement and among public authorities.¹⁶⁶ Despite the Code’s non-legal force, WADA can report non-compliance with the Code by a government or international federation to the IOC, which can, in turn, impose sanctions on individual governments (e.g. revoking their right to host the Olympic Games), national Olympic committees and national sport federations (e.g. revoking their right to send athletes to the Olympic Games), and IFs (e.g.

¹⁶¹ In May, 2001, governments affiliated with WADA formed an International Intergovernmental Consultative Group on Anti-Doping in Sport, which met in Cape Town, South Africa, to determine such matters as government representation and funding contributions. The government representation is allocated as follows: Africa, 3 members; Americas, 4 members; Asia, 4 members; Europe, 5 members; and Oceania, 2 members: WADA, online: <<http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=469>>.

¹⁶² *Ibid.*

¹⁶³ Actually, during the first two years of WADA’s operation (2000-2001), the IOC agreed to be responsible for 100% of its funding. The IOC made this decision in order to give governments appropriate time to obtain the necessary budgetary approvals for their 50% contribution: Pound, *supra* note 70. Since January 1, 2002, the IOC has adopted a policy of making payments to WADA only when governments make their payments, thus matching it dollar-for-dollar. The apportioning of funding for each continental grouping of governments was decided at the first meeting of the International Intergovernmental Consultative Group on Anti-Doping in Sport (see *supra* note 159) and was re-confirmed in the Copenhagen Declaration on Anti-Doping in Sport in March, 2003. The current funding formula is as follows: Africa (0.50%), Americas (29%), Asia (20.46%), Europe (47.5%) and Oceania (2.54%).

¹⁶⁴ *World Anti-Doping Code* (effective as of January 1, 2009) [WADA Code].

¹⁶⁵ *Ibid.* at 12.

¹⁶⁶ *Ibid.*

suspending them from the Olympic Movement).¹⁶⁷ The International Standards are also mandatory for signatories and are comprised of five elements: a prohibited list of substances, standards for the testing of bodily samples, standards for accredited laboratories that conduct tests, standards for “therapeutic use exemptions” (which provide narrow exemptions for athletes that need to use a banned substance for medical reasons), and standards on the protection of privacy and personal information of athletes.¹⁶⁸ Finally, Models of Best Practice and Guidelines provide recommended solutions to stakeholders in different areas of anti-doping, but are not mandatory for signatories of the Code.¹⁶⁹

The remaining part of this section will outline the roles and responsibilities of public and private entities within the anti-doping movement. Although some of the organizations and their respective initiatives and instruments were established prior to WADA, they now operate parallel to and in accordance with the WADA program.

2. International Non-Governmental Associations

Prior to the establishment of WADA, the anti-doping programs of the IOC¹⁷⁰ and individual international federations¹⁷¹ were largely independent of each other, which sometimes resulted in conflict. However, since 2000, the IOC and IFs have accepted WADA as the supreme authority

¹⁶⁷ WADA Code, *supra* note 164 at Article 20.1. For a further discussion on this issue, see *infra* note 172 and the accompanying discussion on international non-governmental organizations in the anti-doping movement.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ The IOC first outlawed doping in 1962 and then proceeded to establish the IOC Medical Commission to draft a policy on anti-doping and public a list of prohibited substances. Doping tests were first introduced at the Olympic Games in 1968: Houlihan, *supra* note 103 at 67. See also Rule 2.8 of the *Olympic Charter* which provides that one of the roles of the IOC is to “lead the fight against doping”.

¹⁷¹ In 1928, the International Amateur Athletic Federation (“IAAF”) became the first IF to ban doping. Other IFs implemented similar bans in their respective rules and regulations soon after. However, it was not until 1966 that the IFs for cycling (“UCI”) and football (“FIFA”) introduced actual doping tests: WADA, “A Brief History of Anti-Doping”, online: <<http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=312>>.

in the anti-doping movement and have used their own authority and resources to regulate anti-doping, pursuant to the WADA Code. For instance, the WADA Code is now mandatory for the Olympic Movement.¹⁷² The IOC can only include in the Olympic programme sports which adopt and implement the WADA Code.¹⁷³ All statutes, practices and activities of international federations must adopt and implement the WADA Code in order to be included in the Olympic Movement.¹⁷⁴ Further, all IFs must require as a condition of membership that the policies and programs of national sport federations are in compliance with the Code.¹⁷⁵ Finally, all Olympic athletes must agree to comply with the WADA Code by signing a declaration set out in the Olympic Charter, prior to participating in the Olympic Games.¹⁷⁶

Each international nongovernmental organization has doping control responsibilities at international sporting events,¹⁷⁷ depending on its jurisdictional authority.¹⁷⁸ For example, since the IOC is the ruling body of the Olympic Games, it is responsible for doping control during the Olympic Games. Similarly, IFs are responsible for doping control during World Championship events. However, outside of sporting events (i.e. “out-of-competition testing”) doping control testing may be initiated and directed by WADA,¹⁷⁹ the IOC, or an IF.¹⁸⁰

¹⁷² Olympic Charter, *supra* note 92. Rule 44 is enacted pursuant to WADA Code, *supra* note 164 at Articles 20.1 to 20.3.

¹⁷³ Olympic Charter, *ibid.* at Rule 46.3.

¹⁷⁴ *Ibid.* at Rule 26.

¹⁷⁵ WADA Code, *supra* note 164 at Article 20.3.2.

¹⁷⁶ Olympic Charter, *supra* note 92 at BLR 45.6.

¹⁷⁷ Doping control responsibilities include the planning of test distribution, sample collection, laboratory analysis, therapeutic use exemptions, results managements and hearing: WADA Code, *supra* note 164 at Appendix 1, Definitions.

¹⁷⁸ *Ibid.* at Article 15.1.

¹⁷⁹ WADA’s legal status to conduct out-of competition testing arises out of a series of agreements with various IFs and national anti-doping agencies. The agreement with an IF authorizes WADA to conduct tests on behalf of that IF. However, in order to conduct the tests, WADA has to rely on the testing services of national anti-doping

3. International Intergovernmental Associations

The primary intergovernmental organization in the anti-doping movement is the United Nations Economic, Social and Cultural Organisation (“UNESCO”).¹⁸¹ On October 19, 2005, the General Conference of UNESCO adopted the first International Convention against Doping in Sport (“UNESCO Convention”)¹⁸², at its plenary session. The UNESCO Convention entered into force on February 1, 2007,¹⁸³ and has since been ratified by 100 countries.¹⁸⁴ The rationale behind the adoption of a convention was that many governments could not be legally bound by a non-governmental document, such as the WADA Code.¹⁸⁵ Since the UNESCO Convention incorporates the principles of the WADA Code, it essentially gives effect to the Code under public international law.

To monitor the implementation and enforcement of the UNESCO Convention, a Conference of Parties was convened under the Convention.¹⁸⁶ The Conference of Parties is composed of representatives from States Parties and UNESCO members.¹⁸⁷ The Conference of Parties reviews reports from governments outlining all the measures they have taken to comply with the

agencies. As a result, WADA has also entered into an agreement with the Drug-Free Sport Consortium (comprising the anti-doping agencies of Australia, Canada and Norway) for the provision of testing services.

¹⁸⁰ WADA Code, *supra* note 164 at Article 15.2.

¹⁸¹ UNESCO was created as an agency of the United Nations in the 1940s and became increasingly involved in aspects of sport between the 1960s and mid-1980s, when it created the International Committee for Sport and Physical Education in 1976 and in the International Charter of Physical Education and Sport in November, 1978. However, both the Committee and the UNESCO Charter had limited influence on international sports policy: see Houlihan, *supra* note 103 at 85.

¹⁸² *Convention against Doping in Sport* (entered into force 1 February 2007) [UNESCO Convention].

¹⁸³ Under UNESCO procedures, 30 countries needed to ratify the UNESCO Convention in order for it to enter into force. The 30th country ratified the Convention in December, 2006.

¹⁸⁴ UNESCO, “100 Countries ratify Anti Doping Convention”, online: <http://portal.unesco.org/shs/en/ev.php-URL_ID=12507&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

¹⁸⁵ WADA, “Overview of the UNESCO Convention against Doping in Sport, online: <<http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=273>>.

¹⁸⁶ UNESCO Convention, *supra* note 182 at Article 28.

¹⁸⁷ *Ibid.* at Article 29.

Convention.¹⁸⁸ WADA is invited as an “advisory organization” to the Conference of Parties, and several international non-governmental organizations, such as the IOC and the International Paralympic Committee are invited as “observers” to the Conference.¹⁸⁹

In addition to UNESCO, a number of intergovernmental organizations have been established to coordinate the efforts of national governments in the anti-doping movement.¹⁹⁰ One of largest organizations is the International Intergovernmental Consultative Group on Anti-Doping in Sport (“IIGCADS”) which comprises representatives from over 100 governments. The IIGCADS has met several times to determine the apportionment of WADA funding obligations between governments, and the distribution of government representation on WADA’s Foundation Board and Executive Committee. Prior to the adoption of the UNESCO Convention, the IIGCADS also developed a memorandum of understanding in support of WADA (the “Copenhagen Declaration on Anti-Doping in Sport”¹⁹¹) as a first step to a binding international instrument on anti-doping in sport. To date, the Copenhagen Declaration has been signed by 193 governments.¹⁹²

Smaller intergovernmental organizations created under multilateral agreements or treaties also form an important part of the anti-doping movement. These organizations primarily serve to complement existing international cooperation by harmonizing anti-doping efforts within or between specific continents. In Europe, for example, the Council of Europe and the European

¹⁸⁸ *Ibid.* at Article 31. The first national reports will be reviewed at the Second Session of the Conference of Parties during October 26 to 28, 2009.

¹⁸⁹ WADA Code, *supra* note 164 at Article 29. The Conference of Parties may decide to invite other relevant organizations as observers, such as IFs.

¹⁹⁰ A rationale for the large number of overlapping intergovernmental organizations may be linked to the fact that public authorities were never comfortable with the legal status of WADA as a private entity governed by Swiss law (see discussion in *supra* note 159).

¹⁹¹ Copenhagen Declaration on Anti-Doping in Sport, available online: <http://www.wada-ama.org/rtecontent/document/copenhagen_en.pdf> [Copenhagen Declaration].

¹⁹² WADA, “Overview - Copenhagen Declaration on Anti-Doping in Sport”, online: <<http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=272>>

Union appoint national government representatives to sit on WADA's Foundation Board and Executive Committee.¹⁹³ The Council of Europe also has its own Anti-Doping Convention ("Council of Europe Convention")¹⁹⁴ and an Additional Protocol to the Convention.¹⁹⁵ The Council of Europe Convention has been ratified by 50 states, including non-Member States of the Council of Europe.¹⁹⁶ The fundamental objectives and obligations set out in the Council of Europe Convention mirror those set out in the WADA Code and the UNESCO Convention.

As another example, the International Anti-Doping Arrangement ("IADA"), which was established in 1991, is an alliance formed between the governments of Canada, Australia, New Zealand, Norway, the United Kingdom, Denmark, Finland and Sweden.¹⁹⁷ Prior to the establishment of WADA, the efforts of the IADA were devoted to the development of an International Standard for Doping Control, which formed the basis for an ISO certification¹⁹⁸ of doping control procedures for all anti-doping associations.¹⁹⁹ The IADA standard has since been subsumed into the WADA International Testing Standard.²⁰⁰

4. National Governments

¹⁹³ WADA, "Government Representation", online: <<http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=469>>.

¹⁹⁴ Council of Europe, Anti-Doping Convention (entered into force on 16 December 1989) [Council of Europe Convention].

¹⁹⁵ Council of Europe, Additional Protocol to the Convention.

¹⁹⁶ For *e.g.* Australia, Belarus, Canada and Tunisia.

¹⁹⁷ The IADA was established in 1991.

¹⁹⁸ See *supra* note 17 for further discussion on the composition of the ISO.

¹⁹⁹ International Anti-Doping Arrangement, "About the IADA", online: <<http://www.iada.rf.se/t2.aspx?p=105084>>.

²⁰⁰ *Ibid.*

Under the UNESCO Convention, States Parties are obligated to undertake and adopt appropriate legislative,²⁰¹ policy,²⁰² regulatory and/or administrative measures to: restrict the availability and use of prohibited substances or methods, including measures against trafficking;²⁰³ facilitate doping controls and support national testing programmes;²⁰⁴ withhold financial support from athletes and athlete support personnel (i.e., coaches or trainers) who commit an anti-doping rule violation, or from sport organizations that are not in compliance with the WADA Code;²⁰⁵ encourage producers and distributors of nutritional supplements to establish “best practices” in the labelling, marketing and distribution of products which might contain prohibited substances;²⁰⁶ encourage cooperation between domestic and foreign anti-doping agencies for the purposes of doping control and “no advance notice” testing;²⁰⁷ support the provision of anti-doping education to athletes and athlete support personnel;²⁰⁸ encourage and promote anti-

²⁰¹ See e.g. Denmark (*Act on Promotion of Doping Free Sport; Act on Prohibition of Certain Doping Substances; Executive Order on Promotion of Doping Free Sport*); France (*Sports Code, Protection of Health of Athletes and the Fight Against Doping*); Germany (*Medicinal Products Act; Narcotics Law*); Spain (*Act on health protection and fight against doping in sport*); and Sweden (*Act prohibiting certain doping substances*).

²⁰² See e.g. the Canadian Anti-Doping Policy, available online: <<http://www.cces.ca/files/pdfs/CCES-POLICY-CADP-E.pdf>>.

²⁰³ UNESCO Convention, *supra* note 182 at Articles 8 and 9.

²⁰⁴ *Ibid.* at Article 9.

²⁰⁵ *Ibid.*, at Articles 11(a) and (b).

²⁰⁶ *Ibid.* at Article 10.

²⁰⁷ *Ibid.* at Articles 13 and 14; see also WADA Code, *supra* note 164 at Article 20.5.2. The Reciprocal Testing Agreements between Canada’s anti-doping agency (the Canadian Centre for Ethics in Sport (“CCES”) and the anti-doping agencies of Australia and the United States provide for the effective and efficient testing of each country’s respective athletes. For instance, the Agreements allow the CCES to arrange for the testing of Canadian athletes who are in Australia or the United States: Canadian Centre for Ethics in Sport, “Reciprocal Testing Agreement”, online: <http://www.cces.ca/forms/index.cfm?dsp=template&act=view3&template_id=142&lang=e#reciprocal>.

²⁰⁸ UNESCO Convention, *ibid.* at Articles 19, 22 and 23; see also WADA Code, *ibid.* at Article 18. For example, the Coaching Association of Canada’s National Coaching Certification Program and its educational module on “Doping Prevention and Managing Conflict”.

doping research;²⁰⁹ and submit national reports documenting compliance with the Convention to the Conference of Parties.²¹⁰

National governments may also contribute to the “Fund for the Elimination of Doping in Sport” created under the UNESCO Convention, which is separate and apart from their required contributions used to finance WADA.²¹¹ The Fund is primarily used to assist States Parties in developing and implementing anti-doping programmes.²¹²

5. National Anti-Doping Agencies

Pursuant to Articles 11 and 12 of the UNESCO Convention, States Parties are obliged to facilitate the creation and implementation of a national testing programme to be administered by a domestic anti-doping organization. Examples of such national anti-doping agencies include the Canadian Centre for Ethics in Sport (“CCES”), the United States Anti-Doping Agency (“USADA”), and the Australian Sports Drug Agency (“ASDA”). Each national anti-doping organization is responsible for initiating and directing all aspects of doping control during nationally sanctioned sporting events.²¹³ National anti-doping organizations may also initiate and direct the testing of athletes outside of competition, if an athlete is present in their country or is a national, resident, or member of a sport organization, of that country.²¹⁴

E. **Delocalized Dispute Resolution**

²⁰⁹ UNESCO Convention, *ibid.* at Articles 24 to 27; see also WADA Code, *ibid.* at Article 19.

²¹⁰ UNESCO Convention, *ibid.* at Article 31.

²¹¹ *Ibid.* at Article 17.

²¹² *Ibid.* at Article 18.

²¹³ WADA Code, *supra* note 164 at Article 15.1.

²¹⁴ *Ibid.* at Article 15.2

1. Introduction

Disputes in sport are inevitable. They occur both on and off the sporting field and involve a diversity of subject matters, including athlete eligibility and selection, doping infractions, the reviewability of decisions made by match officials, and commercial agreements. Further, with the expansion of international sport, both in terms of the number of athletes and countries that participate in the Olympic Movement, combined with the growing commercialization of sport,²¹⁵ it is unsurprising that the resolution of legal disputes has become an integral part of the architecture of the international sport system.

Historically, the majority of sport disputes have been resolved by private bodies, such as regional and national sport organizations, international federations, and the IOC. Courts in Canada, the United States, the United Kingdom, Australia and elsewhere, have been reluctant to intervene in such disputes for a variety of reasons.²¹⁶ Nafziger notes that there are three primary reasons why courts will exercise restraint when adjudicating sport disputes.²¹⁷ First, courts are generally unfamiliar with the subject matter and structure of sports bodies and, as a result, will often defer to dispute resolution within a sports body. As a private body whose authority is based on a contractual relationship with its members, a sport organization exercises regulatory authority over a specialized field, providing it with a high level of expertise. Accordingly, when reviewing

²¹⁵ As Samuel and Gearheart note, the growth of the mass media combined with the popularity of sport has made international sport a highly marketable product: Samuel, Adam & Gearhart, Richard, "Sporting Arbitration and the International Olympic Committee's Court of Arbitration for Sport" (1989) 6:4 *Journal of International Arbitration* 39. For instance, sport now accounts for more than 3 per cent of world trade and 1 per cent on the combined Gross National Product of the 15 member states of the European Union: European Commission, *The European Model of Sport* (1999).

²¹⁶ Blackshaw, Ian, "The Court of Arbitration for Sport: An International Forum for Settling Disputes Effectively 'Within the Family of Sport'", (2003) 2:2 *Entertainment Law* 61 at 61. See e.g. *Dolan v. US Equestrian Team* 608 A.2d 434 (N.J. Super A.D. 1992).

²¹⁷ Nafziger, James, A.R., "International Sports Law: A Replay of Characteristics and Trends" (1992) 86 *American Journal of International Law* 489 at 510 [Nafziger, "Trends"].

the substance of a sport body's decision, a court will typically not engage in a thorough analysis of its reasonableness.²¹⁸ For example, when making determinations regarding the selection of athletes for international competition, a sport body may rely on a number of subjective and objective criteria. In such cases, a court does not have the appropriate level of expertise to conduct a full rehearing or appeal of the matter on the merits.²¹⁹ Similarly, with respect to matters of natural justice, courts will often defer to the more informal procedures of sport bodies, so long as such procedures provide a measure of protection against biased decision-making and ensure a fair hearing.²²⁰

Second, with respect to the reviewability 'on-field' or technical decisions made by game officials,²²¹ there is an enduring philosophy that the rules of the game should settle disputes,

²¹⁸ See *e.g. Johnson v. Athletics Canada*, [1997] O.J. No. 3201 (Ct. J.), where Justice Caswell, in deciding whether a life-time ban issued by Athletics Canada and the International Amateur Athletic Federation ("IAAF") against Ben Johnson was against the common law doctrine of restraint of trade, wrote at para. 32:

[t]his court is required to extend a measure of deference to the justifications advanced by the IAAF as the world governing body for amateur athletes when considering the reasonableness of the ban. It is not this court's function to serve as a court of appeal on the merits of decisions reached by tribunals exercising jurisdiction over specialized fields. The IAAF has special expertise not only in regulating amateur athletics but also in regulating, detecting and preventing drug abuse.

²¹⁹ See *e.g. Michels v. the United States Olympic Committee*, 741 F.2d 155 (7th Cir. 1984), where Judge Posner, in deciding that the 1978 US Amateur Sports Act, *supra* note 133, precluded the court from exercising jurisdiction over eligibility claims involving athletes, wrote: "[a]ny doubt on this [position] can be dispelled by the reflection that there can be few less suitable bodies than federal courts for determining the eligibility, or the procedures for determining eligibility, of athletes to participate in the Olympic Games."

²²⁰ See *e.g. McInnes v. Onslow-Fane*, [1978] 3 All ER 21, where former English Vice-Chancellor, Megarry noted

I think that the courts must be slow to allow an implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is even so where those bodies are concerned with the means of livelihood of those who take part in those activities. The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens.

²²¹ Beloff notes that such non-intervention also reflects the principle of subsidiarity, which, in the context of sport, provides that decision-making authority should be respected and preserved at the lowest level of an institutional hierarchy, that being the level of referees, umpires and other match officials: Beloff, M. J., "Is there a Lex Sportiva?" (2005) 5:3 International Sports Law Review 49 at 53 [Beloff, "Lex Sportiva"].

rather than the rules of court.²²² The rationale for this position is that the ‘rules of law’ do not extend to field-of-play decisions and, therefore, cannot be used to overturn the decision of a match official or alter the outcome of a sporting event. Instead, any error made in the course of a field-of-play decision may only be remedied by the corrective mechanisms, if any, provided for in the ‘rules of the game’ themselves.²²³ This qualified immunity of on-field decisions is further supported by a court’s lack of expertise in the technical side of sport, the inherent subjectivity of on-field decisions, and the problems of rewriting a sporting result after the event.²²⁴

Third, the autonomous and transnational nature of international sports law has persuaded courts to defer to the private regulatory authority of international non-governmental organizations within the Olympic Movement.²²⁵ For instance, where challenges have been brought against the decisions or rules of the IOC, courts have refused to intervene through the application of their own national laws.²²⁶

Together, these three reasons underlying the reluctance of courts to intervene into the affairs of sport bodies have facilitated the delocalization of dispute resolution within international sport.

Courts are far more comfortable with allowing private sport organizations, which arguably have

²²² Nafziger, “Trends”, *supra* note 132 at 510. As an exception to this general rule of non-reviewability, a court or arbitrator will likely interfere with an on-field decision was made arbitrarily or with malicious intent: *Mendy v. Association Internationale de Boxing Amateur (AIBA)*, CAS OG 66/006. The decisions of the Court of Arbitration for Sport are available online: <<http://www.tas-cas.org/jurisprudence-archives>>.

²²³ Foster, “Lex Sportiva”, *supra* note 1 at 420, refers to the ‘rules of the game’ as a form of *lex ludica*.

²²⁴ *Yang v. Hamm*, CAS 2004 / A / 704.

²²⁵ Nafziger, “Trends”, *supra* note 133 at 510.

²²⁶ In 1977, a Belgium court confirmed the status of the IOC’s rule-making authority as part of customary international law where it held that “international rules of sport supersede conflicting national policies and laws in particular contexts”: James Nafziger, *International Sports Law*, (Ardsley, NY: Transnational, 2004) at 75 [Nafziger, “International Sports Law”].

See also *Martin v. International Olympic Committee*, *infra* note 411; *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games*, *infra* note 388, both of which will be further discussed in Part Four of this paper titled, “Case Studies”.

superior expertise and, in some cases, clearer jurisdiction, to resolve sport disputes involving their members. The remaining part of this section will outline the delocalized systems of dispute resolution at both the national and international levels of sport. It will conclude with a more detailed analysis of the structure and functions of the Court of Arbitration for Sport.

2. Delocalized Dispute Resolution in National Sport

At the national sport level, there are two main types of dispute resolution: (1) appellate review within sport bodies, and (2) sport-specific arbitration by independent arbitration panels. With respect to appellate review, many regional and national sport organizations provide mechanisms for the resolution of disputes arising from decisions or actions relating to team selection, discipline, funding, and the interpretation or application of technical rules. The review process is governed by the appeal provisions found in the sport body's policies or regulations, which generally set out the grounds for an appeal, review procedures, and the composition of the reviewing body. The grounds for an internal appeal are typically narrow, but generally permit review on the basis that a decision was made in excess of jurisdiction or contrary to principles of natural justice.²²⁷

Appellate review mechanisms within sport bodies have been very effective in ensuring that sport disputes are resolved outside of court. Athletes and coaches are generally precluded from challenging the decisions or actions of their sport body in court without first exhausting any available internal appeal remedies.²²⁸ Even once an internal appeal process is exhausted, a

²²⁷ See *e.g.* Swimming/Natation Canada's dispute resolution policy which allows an appeal on the grounds that a decision was made without authority, jurisdiction, or in accordance with prescribed procedures, influenced by bias, or made without supporting evidence: SNC, "Appeals Policy", online: <<https://www.swimming.ca/Appeals.aspx>>.

²²⁸ This preclusion may operate at public or private law. In public administrative law, it is a fundamental principle that a decision of a "public" body is not amenable to judicial review until a party has first exhausted all other means

court's ability to interfere with the decisions of a sport body is limited to a narrow scope of review and a deferential standard of review.²²⁹

In many cases, appeal procedures are adopted by sport bodies as a matter of good governance. They ensure that sport disputes are resolved in an equitable manner that respects the due process rights of members. Further, although internal appeal procedures and their associated privative clauses cannot oust the supervisory jurisdiction of courts entirely,²³⁰ they provide a means to encourage the resolution of disputes internally, and act as a deterrent to subsequent proceedings in court. This is significant as the costs associated with litigation can be prohibitive for the majority of sport bodies, which are non-profit, voluntary associations.

Apart from good governance, the adoption of formal internal appeal procedures by sport bodies may also be externally mandated by international sport federations or national governments. In the case of sport federations, a number of IFs require their member national sport federations to include a clause in their statutes that provides that all disputes arising from the IF's technical

of recourse for challenging the body's decision, such as internal appeals: *Harlekin v. University of Regina*, [1979] 2 S.C.R. 561. This principle would apply to a majority of national sport organizations, which are considered in several countries to be "quasi public" and thus amenable to judicial review: Canada (see *McGarrigle v. Canadian Interuniversity Sport*, [2003] O.J. No. 1842); United States (*Reynolds v. The Athletic Congress*, [1991] 935 F.2d 270); Australia (see *Forbes v. NSW Trotting Club Ltd.*, (1999) 143 Cl.L.R. 242); New Zealand (see *Finnigan v. New Zealand Rugby Football Union*, [1985] 2 NZLR 159), Scotland (see *St. Johnstone FC v. Scottish Football Association*, 1965, SLT 171); South Africa (see *Jockey Club of South Africa v. Forbes* (1993) (1) SA 649 (A)) and possibly the United Kingdom (see *R v. Panel on Take-overs and Mergers, ex. p. Datafin*, [1987] QB 815). Nevertheless, even where an athlete is limited to private law remedies in challenging the decision of a sport body, they must first exhaust any mandatory internal appeal procedure provided for in the sport body's by-laws or regulations, to which they are contractually bound.

²²⁹ In the case of judicial review, a court may review the decision of a sport body for excess of jurisdiction, errors of law, policy, fact and discretion, and for breach of procedural fairness. However, since most sport disputes involve questions of fact or discretion, rather than questions of law, a court will generally review the decisions of a sport body on a deferential standard of review, such as reasonableness or patent unreasonableness. Similarly, the standard of review for the purpose of determining whether a sport body has complied with the rules of procedural fairness or natural justice is also likely to be deferential: see *McInnes v. Oslow-Fane*, *supra* note 136. In the case of private law review founded in contract, a court's inherent jurisdiction still allows it to review the decision of a sport body to determine whether it was made in excess of jurisdiction, contrary to the principles of natural justice, or otherwise in bad faith: see *Baker v. Jones*, [1954] 2 All ER 553, and more recently, *Street v. B.C. School Sports*, [2005] B.C.J. No. 1523 [*Street*].

²³⁰ *Street*, *ibid.*

rules must be submitted to the jurisdiction of an internal tribunal, thus precluding recourse to ordinary courts.²³¹ With respect to national governments, the requirement that sport bodies adopt dispute resolution procedures can be legislated, or can be attached to the provision of public funding of sport bodies. In the United States, for example, the *Amateur Sport Act* requires all national sport federations to provide procedures for the “prompt and equitable resolution of grievances of its members.”²³² In contrast, in Canada, where there is an absence of legislation governing sport bodies, national and provincial sport policies have made the adoption of dispute resolution policies a requirement for the public funding of national and provincial sport organizations.²³³ Since sport organizations in Canada heavily rely on government funding to carry out their operations, the incorporation of a process of private dispute resolution effectively becomes mandatory.

The second main type of dispute resolution at the national sport level is private independent arbitration. Independent sport-specific arbitration has been operating in the United States since 1978²³⁴ and in the People’s Republic of China since 1995.²³⁵ The United Kingdom²³⁶,

²³¹ See *e.g.* Rule 60.3 of the IAAF’s (International Association of Athletics Federations) *Competition Rules 2009*, which provides that each member national sport federation shall incorporate a provision in its constitution that all disputes arising from the IAAF’s technical rules be submitted to a hearing body constituted or authorized by the national sport federation. Rule 60.3 adds that such a hearing shall respect the following principles: a timely hearing before a fair and impartial hearing body; the right of the individual to be informed in a fair and timely manner of the charge against him; the right to present evidence, including the right to call and question witnesses; the right to be represented by legal counsel and an interpreter (at the individual’s expense); and the right to a timely and reasoned decision in writing.

²³² US Amateur Sport Act, *supra* note 133 at s. 220522(a)(12).

²³³ Federally, the *Sport Funding and Accountability Framework, 2009-2013* includes as a general criterion for the funding of national sport organizations, the existence of an “internal Appeal process consistent with established principles of due process and natural justice.” Provincially, the Province of Ontario’s *Sport Recognition Policy* requires provincial sport organizations to include an appeal procedure within its discipline policy.

²³⁴ US Amateur Sport Act, *supra* note 133, provides for certain enumerated disputes to be referred to independent third party dispute resolution through the American Arbitration Association (“AAA”).

²³⁵ Legislation titled *Sports Law of the People’s Republic of China* provides for the private arbitration and mediation of sport disputes.

Australia²³⁷, New Zealand²³⁸, Japan²³⁹ and Canada,²⁴⁰ have all introduced independent, sport-specific systems of arbitration in the last decade.²⁴¹

For the majority of sport disputes, independent arbitration generally commences after the exhaustion of any available internal appeal remedies within the national sport body.²⁴² However, in the case of doping matters, once an anti-doping rule violation has been asserted against an athlete, it is an arbitration panel, rather than a sport body or an anti-doping agency, that generally acts as the first instance adjudicator.²⁴³

Although a common characteristic of private arbitration is that the awards of an arbitration panel are private and confidential, several national sport-specific arbitration systems openly publish

²³⁶ United Kingdom, the Sports Dispute Resolution Panel (“SDRP”) was established in 2000, online: <<http://www.sportresolutions.co.uk>>.

²³⁷ Australian National Sports Dispute Centre (“NSDC”) was formally established in 1996 (Blackshaw, I.S. (2002). *Mediating Sports Disputes: National and International Perspectives*. The Hague, The Netherlands: T.M.C. Asser Press). The NSDC has since been abolished, and now all appeals from decisions of an appeal tribunal within a sport body proceed directly to the Court of Arbitration for Sport.

²³⁸ New Zealand introduced its Sports Dispute Tribunal in 2003, online: <<http://www.sportstribunal.org.nz>>.

²³⁹ Sport-specific arbitration was introduced in 2003: Dogauchi, M., *The Activities of the Japanese Sports Arbitration Agency*, 1-2 *International Sports Law Journal* at 3.

²⁴⁰ Sport Dispute Resolution Centre of Canada began operating on a permanent basis in 2004.

²⁴¹ In addition to national systems of sport arbitration, which can hear disputes involving all sports, a separate national system of sport arbitration exists exclusively for football. In 2001, FIFA created the National Dispute Resolution Chamber (“NDRC”). The NDRC primarily hears disputes between clubs and players regarding employment and contractual issues. However, currently only a limited number of FIFA’s member associations have established a national dispute resolution chamber in their country: *FIFA Regulations, National Dispute Resolution Chamber Standard Regulations*, Preamble.

²⁴² See e.g. Article 3.1(b) of the Canadian Sport Dispute Resolution Code; s. 220527 of the US Amateur Sports Act, *supra* note 133; and Rule 2.1 of the Arbitration Rules of the UK Sport Dispute Resolution Panel. Note, however, that parties to arbitration may, waive the internal appeal process because of tight timelines to process such a hearing, as in the case of selection disputes where a competition is imminent, or for reasons of administrative expediency and cost.

²⁴³ WADA Code, *supra* note 164, Article 8.1 requires each national doping agency to provide a hearing process for any person who is asserted to have committed an anti-doping rule violation. Further, pursuant to Article 22.3 of the WADA Code, this hearing must be before an arbitration panel. In some countries, this hearing process has been delegated directly to a national sport-specific arbitration system, such as the Sport Dispute Resolution Centre of Canada and the Sports Tribunal of New Zealand.

their decisions.²⁴⁴ For those systems that do, a substantial body of case law is slowly developing which may be relied upon by parties and arbitrators. For example, since 2002, the Sport Dispute Resolution Centre of Canada has released 119 arbitral awards,²⁴⁵ and there is a growing trend among parties and arbitrators to rely on these awards.²⁴⁶

The decisions of most of national sport-specific arbitration systems are ‘final and binding’ on the parties, subject only to judicial review before a domestic court.²⁴⁷ However, some national arbitration systems, such as the Sports Dispute Tribunal of New Zealand,²⁴⁸ allow their decisions to be appealed to the international Court of Arbitration for Sport. Further, all doping disputes involving international-level athletes must be appealed exclusively to the Court of Arbitration for Sport.²⁴⁹

Parties can consent to the jurisdiction of a national arbitration panel in one of three ways. First, the rules and regulations of a sport body may expressly permit recourse to the national arbitration system. In Canada, for example, all national sport organizations receiving government funding are required to incorporate into their dispute resolution policies, an appeal process to the Sport

²⁴⁴ For instance, the arbitral awards of the Sport Dispute Resolution Centre of Canada and the Sports Tribunal of New Zealand are published and available on-line. Note, however, that even if a national arbitration system does not regularly publish its decisions, it is required to publicly disclose any anti-doping rule violation determined by an arbitration panel, pursuant to Article 14.2.2 of the WADA Code, *ibid*.

²⁴⁵ As of November 9, 2009.

²⁴⁶ For an example of the reliance of a party on the previous decisions of an arbitration panel, see *Adams v. Athletics Canada* (SDRCC 09-0098, 9 February 2009) at 6; for an example of reliance on decisions by an arbitrator, see: *Mayer v. CFF* (SDRCC 08-0077, 5 May 2008) at 11, where Arbitrator Pound makes reference to the growing body of jurisprudence and the deference one arbitrator will show to another “in the form of respect for decisions reached by its [SDRCC] adjudicators.”

²⁴⁷ See *e.g.* Article 6.21(e) of the Canadian Sport Dispute Resolution Code, which provides that the award of an arbitration panel is “final and binding”, may not be appealed on “questions of law, fact or mixed questions of law and fact”, may not be restrained by “injunction, prohibition or other process or proceeding in a court”, and is “not removable by certiorari or otherwise by a court”.

²⁴⁸ *Rules of the Sports Tribunal of New Zealand*, Rule 28(b), online: <<http://www.sportstribunal.org.nz/rules/rules-sports-tribunal.pdf>>.

²⁴⁹ WADA Code, *supra* note 164 at Article 13.2.1.

Dispute Resolution Centre of Canada.²⁵⁰ As alluded to earlier, since a significant majority of Canadian sport bodies are dependent on government funding, the arbitral process is practically mandatory. Second, national-level athletes who are selected to compete at major national or international competitions, or who receive government funding, are typically required to sign an athlete agreement that contains an arbitration clause. The clause provides that any dispute arising from a specified competition, or the provision of funding, proceeds to arbitration. Since athletes are required to sign athlete agreements in order to compete and/or receive funding, the arbitral process becomes mandatory. Third, parties to the dispute may agree in writing, under a formal arbitration agreement, to submit a dispute to arbitration.²⁵¹

Arbitration procedures are set out in the procedural codes or rules of each national sport-specific arbitration system. In general, the scope of authority given to arbitration panels to determine their own hearing procedures is very broad and flexible.²⁵² This allows an arbitration panel to ensure that the form of the arbitration follows its function. For example, where a dispute merely involves alleged errors in the interpretation and application of a selection policy, a written or ‘paper’ hearing may be sufficient to resolve the matter expeditiously and cost-effectively. Conversely, where an arbitration panel is required to make full findings of fact or conduct a *de*

²⁵⁰ See *Sport Canada Contribution Guidelines - Funding Policies and Terms, 2009-2001*, and *Sport Funding and Accountability Framework*, *supra* note 233.

²⁵¹ This may occur where parties agree to waive any internal appeal remedies and proceed directly to arbitration, for further discussion on this point see *supra* note 242.

²⁵² See *e.g.* Rule 8.1 of the Canadian Sport Dispute Resolution Code, which provides that the arbitration panel shall establish its own procedures so long as the parties are treated “equally and fairly”, and further, that the panel may take such steps and conduct the proceedings “to avoid delay and to achieve a just, speedy, and cost-effective resolution of the dispute.”

novo hearing, they may rely on more formal hearing procedures that incorporate witnesses, cross-examinations and the admission of expert evidence.²⁵³

The scope of an arbitration panel's review powers is similarly broad, allowing it to adjudicate virtually any kind of dispute. For example, under Article 6.12 of its procedural code, the Sport Dispute Resolution Centre of Canada has the broad power to review "the facts and law" of any dispute. In the majority of cases, the 'law' used to resolve a dispute will be the policies, rules and regulations of a sport body, general principles of contract interpretation²⁵⁴, administrative law,²⁵⁵ and equitable principles.²⁵⁶ However, where the nature of a dispute is more complex, an arbitration panel may rely on such law and grant such remedies, as it deems necessary to ensure the just and equitable resolution of a dispute. For example, Canadian sport arbitrators have interpreted their scope of review to extend to the hearing of complaints of discrimination under human rights legislation.²⁵⁷

Finally, arbitration panels are generally comprised of arbitrators who have an intimate knowledge of the national sport system within their country, and are generally well-versed in sports law issues.

²⁵³ See *e.g.* Rules 10 and 11 of the Arbitration Rules of the UK Sport Dispute Resolution Panel which collectively provide for the hearing of witness and the admission of expert evidence.

²⁵⁴ For instance, the doctrine of *in dubio contra proferentem*: see *University of Regina v. Canadian Interuniversity Sport* (SDRCC 06-0039, 24 February 2006); and the doctrine of *pacta sunt servanda*: see *Badminton Canada and Milroy v. Canadian Olympic Committee*, SDRCC 04-0005, July 2004.

²⁵⁵ Generally, the law governing substantive review and procedural fairness. And specifically, the principle of *nullum crimen, nulla poena sine lege*, which provides that sanctions cannot be imposed unless there is a violation of a rule and unless sanctions are provided for in the rule: see *Canadian Amateur Diving Association v. Miranda* (SDRCC 05-0030, 4 October 2005).

²⁵⁶ For example, the doctrine of promissory estoppel: see *Canadian Amateur Boxing Association, Pascal & Gaudet v. Canadian Olympic Committee* (SDRCC 04-0003, 10 July 2004).

²⁵⁷ See *CCES, Athletics Canada, and Government of Canada v. Adams* (SDRCC DT-06-0039, 11 June 2007); and *Softball Canada v. Canada Games Council* (SDRCC 08-0076, 4 August 2008). Note, however, that in *CCES v. Adams*, Arbitrator McLaren, at para.164, held that Sport Dispute Resolution Centre of Canada was held not to be a "court of competent jurisdiction" for the purposes of applying, and granting a remedy under, the Canadian *Charter of Rights and Freedoms*.

3. Delocalized Dispute Resolution in International Sport

International sport disputes can involve several parties, including international-level athletes, IFs, associations of IFs, national Olympic committees, ANOC, the IOC and WADA. The systems used to resolve these disputes mirror those which exist at the national sport level, namely, internal appellate review and independent arbitration. With respect to the former, most international non-governmental organizations within the Olympic Movement have a system of internal appellate review for the purposes of resolving disputes arising from their own decisions or actions. The appeal procedures of these organizations vary in complexity. For instance, the majority of disputes relating to decisions of the IOC are resolved solely by the IOC Executive Board.²⁵⁸ Similarly, the international federations for swimming²⁵⁹ and gymnastics²⁶⁰ have a single appellate tribunal to adjudicate the majority of disputes. In contrast, the international federation for football (“FIFA”) has a number of dispute resolution procedures depending on the nature of a dispute and the parties involved.²⁶¹

Regardless of the form or structure of an internal dispute resolution process, the majority of international sport bodies provide recourse, in the form of binding arbitration, to the Court of Arbitration for Sport. This includes the IOC,²⁶² all international Olympic sport federations, non-

²⁵⁸ Olympic Charter, *supra* note 92 at Rules 15.4 and 42.2. For instance, a dispute arising from the decision of the IOC Session not to include a certain sport in the Olympic Games programme would be resolved by the IOC Executive Board.

²⁵⁹ FINA, *By-Laws, 2009-2013*, Article 6.

²⁶⁰ Article 20 of Federation Internationale de Gymnastique, *Statutes*, Edition 2009, in effect from 1 January 2009; Article 30, Federation Internationale de Gymnastique, *Code of Discipline*. A separate appeal body, the Jury of Appeal, is used to hear disputes relating to the application of technical rules during competitions.

²⁶¹ For instance, the FIFA Players’ Status Committee may hear disputes concerning the eligibility of players for representative teams, the FIFA Dispute Resolution Chamber hear disputes relating to contractual or employment matters, and the FIFA Appeals Committee may hear appeals from the decisions of the Ethics Committee and the Disciplinary Committee.

²⁶² The submission of disputes involving the IOC is an exception to the general rule that the IOC is the final arbiter of disputes involving the Olympic Charter: Olympic Charter, *supra* note 92 at Rule 6.3.

Olympic international sport federations,²⁶³ and national anti-doping agencies (where an international-level athlete is appealing a doping decision²⁶⁴).²⁶⁵

4. The Court of Arbitration for Sport

(a) *Introduction*

The Court of Arbitration for Sport (“CAS”) was created by the IOC on April 6, 1983,²⁶⁶ pursuant to Swiss law. As Anderson notes, the impetus behind the establishment of CAS was the IOC’s realization that, despite its worldwide appeal, neither its own National Olympic Committee nor the rest of the Olympic Movement enjoyed any immunity from national jurisdictions.²⁶⁷ Simply put, CAS was intended to serve as an independent authority specializing in sports-related disputes and authorized to pronounce binding decisions.²⁶⁸ In many ways, CAS has surpassed this role.

²⁶³ For example, the International Rugby Board (see Reg. 21, *Regulations Relating to the Game*, regarding anti-doping appeals to CAS); the International Cricket Council (see s. 1.4(b), *Terms of Reference for ICC Dispute Resolution Committee*, regarding limited appeals to CAS); and the International Motorcycle Federation (see article 3.9, *Road Racing World Championship Grand Prix Regulations*).

²⁶⁴ WADA Code, *supra* note 164 at Article 13.2.1.

²⁶⁵ Currently, CAS does not hear disputes involving North American professional sports leagues, such as the National Hockey League or the National Football League, which have traditionally resorted to courts or their own systems of private arbitration to resolve disputes. Similarly, Formula One, despite having international scope and being governed by an IF (the Fédération Internationale de l’Automobile), provides its own dispute resolution system (see Kaufmann-Kohler, G., “Formula 1 racing and arbitration: the FIA tailor-made system for fast track dispute resolution”, *Arbitration International* 2001 at 173. However, if professional sports leagues (that are currently not part of the Olympic Movement) choose to join the anti-doping movement by accepting the terms of the WADA Code, they will also be required to have doping disputes resolved by CAS: see Nafziger, J.A.R., “The Future of International Sports Law” (2006) 42 *Willamette Law Review* 861 [Nafziger, “Future of Sports Law”].

²⁶⁶ For a detailed background on the history of CAS, see Matthieu Reeb (ed.), *Digest of CAS Awards II 1998-2000* (Kluwer Law International, 2002); Blackshaw, *supra* note 216.

²⁶⁷ Anderson, J. “‘Taking Sports out of the Courts’: Alternative Dispute Resolution and the International Court of Arbitration for Sport” (2000) 10:2 *Journal of Legal Aspects of Sport* 123 at 123.

²⁶⁸ Reeb, *supra* note 266 at xxvii.

Since its beginning, CAS has produced an increasingly prolific and robust body of case law at the international level of sport. Its activities have prompted legal commentators to describe it as located at the pinnacle of the private autonomous transnational legal order.²⁶⁹ As McLaren notes, “[CAS] provides a forum for the world’s athletes and sports federations to resolve disputes through a single, independent and accomplished sports adjudication body that is capable of consistently applying the rules of different sport organizations and the worldwide rules of the [Olympic Movement and the anti-doping movement].”²⁷⁰ This perspective has also been articulated by others outside of the international sport sphere. The Swiss Federal Tribunal, for example, has recognized CAS as the “true Supreme Court of world sport”,²⁷¹ that “freely exercises juridical control over the decisions of the associations which are brought before it”²⁷², and whose decisions are “to be considered true awards, equivalent to the judgments of State courts.”²⁷³

The remaining part of this section will explore the structure and composition of CAS, and the enforcement of its arbitral awards.

(b) *Structure of CAS*

²⁶⁹ Foster, “Lex Sportiva”, *supra* note 1.

²⁷⁰ McLaren, Richard, H., “The Court of Arbitration for Sport: An Independent Arena for the World’s Sports Disputes” (2000) 35 Val. U. L. Rev. 379 at 381 [McLaren, “CAS”].

²⁷¹ *A. and B. v. IOC*, Swiss Federal Tribunal, 1st Council Chamber Judgment, May 27, 2003 [*A. and B.*].

²⁷² *Gundel v. FEI*, CAS, I Civil Court, Swiss Fed. Trib. (15 Mar. 1993) [*Gundel*].

²⁷³ *A. and B.*, *supra* note 271.

CAS's main headquarters are in Lausanne, Switzerland, but it has two permanent decentralized hearing facilities in New York, the United States (formerly Denver) and Sydney, Australia.²⁷⁴

During the Olympic Games, CAS also operates an ad hoc Division.²⁷⁵

CAS is administered and financed by the International Council of Arbitration for Sport

("ICAS").²⁷⁶ ICAS is composed of twenty members, all of whom must be high-level jurists.²⁷⁷

Members are appointed for a renewable term of four years by the IOC, associations of IFs (the ASOIF the AIWF), and the Association of National Olympic Committees.²⁷⁸ No member can act as an arbitrator or counsel to any proceeding.²⁷⁹ The constituency of ICAS also determines how the funding of CAS is allocated.²⁸⁰

CAS, itself, is comprised of at least 150 arbitrators and 50 mediators²⁸¹ from 55 countries.²⁸²

Each arbitrator must have full legal training and recognized competence with regard to sports law and/or international arbitration.²⁸³ Arbitrators are not obliged to follow earlier CAS awards

²⁷⁴ The decentralized office in Sydney is also known as "CAS Oceania Division".

²⁷⁵ Arbitration Rules for the Olympic Games, Article 2.

²⁷⁶ *Statutes of the Bodies Working for the Settlement of Sports-related Disputes*, s. 2 [CAS Code]. CAS was originally financed and administered by the IOC. However, after the Swiss Federal Tribunal in *Gundel*, *supra* note 272, raised concerns of CAS's independence from the IOC, both organizationally and financially, the IOC created ICAS and amended CAS's Statutes and Regulations in 1994: Reeb, *supra* note 266.

²⁷⁷ CAS Code, *supra* note 172 at s. 4.

²⁷⁸ *Ibid.* at s. 5.

²⁷⁹ *Ibid.*

²⁸⁰ Specifically, the funding of CAS is distributed as follows: 4/12 by the IOC, 3/12 by the ASOIF, 1/12 by the AIWF, and 4/12 by the ANOC. CAS also received funding from the Union of European Football Associations and some other international sport federations, such as the World Chess Federation and the International Rowing Federation: Gardiner, et al. *Sports Law* 3rd. ed. (Routledge-Cavendish: New York, NY: 2007) at 234.

²⁸¹ CAS Code, *supra* note 192 at s. 13.

²⁸² Reeb, *supra* note 167.

²⁸³ CAS Code, *supra* note 276 at s. 14.

based on a formal doctrine of ‘stare decisis’,²⁸⁴ but generally do so in the interests of comity and legal certainty.²⁸⁵

Although CAS provides mediation²⁸⁶ and advisory opinion services,²⁸⁷ it is primarily composed of two divisions: the Ordinary Arbitration Division and the Appeals Arbitration Division.²⁸⁸

Hearings under both divisions may be written or oral,²⁸⁹ and are presided over by a panel of one or three arbitrators.²⁹⁰ The procedural law applicable for both divisions is set out CAS’s

Procedural Code. In the Ordinary Arbitration Division, CAS acts as a court of first instance and hears commercial disputes relating to the execution of contracts.²⁹¹ The applicable substantive law for such disputes is that which is agreed upon by the parties, which includes the option of the parties authorizing CAS to decide a matter *ex aequo et bono* (in a just and equitable manner).²⁹²

If the parties fail to make such a choice, the dispute will be decided according to Swiss law.²⁹³

CAS obtains its “ordinary” jurisdiction where parties agree to submit to arbitration through a formal arbitration agreement, or where a contract between parties includes a clause stating that

²⁸⁴ See *UCI v. J. 7 NCB*, CAS 97/176 at 14 [*UCI*].

²⁸⁵ Gardiner et al., *supra* note 280 at 239.

²⁸⁶ *Ibid.* at s. 20. For a further discussion of CAS mediations, see Blackshaw, *supra* note 216 at 70.

²⁸⁷ *Ibid.* at Rule 60. This service allows any interested sport body (i.e. IOC, IF, NOC, WADA, associations of IFs and NOCs, OCOGSs) may request an advisory opinion from CAS about any legal issue with respect to any activity related to sport. See e.g. *Australian Olympic Committee (AOC)* (CAS 2000/C267) in Reeb, *supra* note 266, at 725, whereby the Australian Olympic Committee, in anticipation of the 2000 Olympic Games, asked CAS for an advisory opinion on the legality of a new full-body swimsuit.

²⁸⁸ CAS Code, *ibid.* at s. 20.

²⁸⁹ *Ibid.* at Rule 44.

²⁹⁰ *Ibid.* at Rule 40.1.

²⁹¹ Reeb, *supra* note 266. For example, contracts pertaining to sponsorship, the sale of television rights, the staging of sporting events, player transfers and employer or agency relationships between players or coaches and clubs or agents.

²⁹² CAS Code, *supra* note 276 at Rule 45.

²⁹³ *Ibid.*

disputes will be decided exclusively by CAS.²⁹⁴ Such arbitration clauses are included in all agreements to which the IOC is a party, and in every athlete entry agreement to the Olympic Games.²⁹⁵ The awards of the Ordinary Arbitration Division are not published unless an award provides, or the parties agree, otherwise.²⁹⁶

The Appeals Arbitration Division hears disputes arising from final-instance decisions taken by sport bodies that generally are of a disciplinary nature.²⁹⁷ The applicable substantive law for such appeals is that which is chosen by the parties;²⁹⁸ typically the rules and regulations of the sport body whose decision is being appealed. If the parties fail to agree on the applicable law, the appeal will be decided pursuant to the law of the country in which the sport body whose decision is being appealed is domiciled, or according to the rules of law the Panel deems appropriate.²⁹⁹ CAS obtains its “appeal” jurisdiction through individual agreements with IFs. Each agreement is then incorporated into an IF’s rules and regulations in the form of an appeal policy. Affiliated national sport federations accept this arbitral procedure by signing membership forms.³⁰⁰ International-level athletes, in turn, must enter into agreements with their own respective national sport organizations, and mandatory clauses in those contracts authorize the original agreement between CAS and the IF.³⁰¹ The awards of the Appeals Arbitration Division are published by CAS, unless both parties agree that they should remain confidential.³⁰²

²⁹⁴ Anderson, *supra* note 267.

²⁹⁵ Olympic Charter, *supra* note 92 at BLR 45.6.

²⁹⁶ CAS Code, *supra* note 276 at Rule 43.

²⁹⁷ *Ibid.* at s. 20.

²⁹⁸ *Ibid.* at Rule 58.

²⁹⁹ *Ibid.*

³⁰⁰ Anderson, *supra* note 267.

³⁰¹ Nafziger, J.A.R., “International Sports Law as a Process for Resolving Disputes” (1996) 45 International and Comparative Law Quarterly 130 [Nafziger, “Process for Resolving Disputes”].

³⁰² CAS Code, *supra* note 276 at Rule 59.

To ensure that the appeals process is not prohibitively costly and to facilitate access to justice, in contrast to the Ordinary Arbitration Division, the appeals process does not require parties to pay arbiter's fees or administrative costs, except for an initial court filing fee of CHF 500.³⁰³

CAS's ad hoc Division has operated at every Olympic Games since 1996, and is now also a fixture at the Commonwealth Games and the European Football Championships.³⁰⁴ Decisions of an ad hoc panel are released within 24 hours of an application being heard.³⁰⁵ Arbitrations at the Olympic Games must be decided pursuant to "the Olympic Charter, the applicable regulations, general principles of law and the rules of law", the application of which the ad hoc panel deems appropriate.³⁰⁶

(c) *Enforcement of CAS Awards*

CAS awards are final and binding on all parties. However, because the seat for all CAS arbitrations (regardless of their actual location) is Lausanne, Switzerland, Swiss municipal law governs all arbitration proceedings. Accordingly, pursuant to the *Swiss Federal Code on Private International Law*,³⁰⁷ CAS awards are amenable to judicial review by the Swiss Federal Tribunal on very narrow grounds.³⁰⁸ A CAS award may not otherwise be appealed to, or judicially reviewed by, another national court.³⁰⁹

³⁰³ *Ibid.* at Rule 64.1.

³⁰⁴ Reeb, *supra* note 266.

³⁰⁵ *CAS Arbitration Rules for the Olympic Games*, Article 18 [CAS Ad Hoc Rules]. For further discussion on the CAS ad hoc Division, see McLaren, Richard, H., "Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games" (2001) 12 *Marquette Sports Law Review* 515 [McLaren, "Ad Hoc Division"].

³⁰⁶ CAS Ad Hoc Rules, *ibid.* at Article 17.

³⁰⁷ *Swiss Federal Code on Private International Law*. Chapter 12 [CPIL].

³⁰⁸ The grounds of review are set out in Article 190 of the CPIL, *ibid.*, and include instances where a panel was constituted irregularly, erroneously held that it did not have jurisdiction, ruled on matters beyond the submitted

The seat of CAS arbitrations also means that a CAS award is a foreign arbitral award in all countries, except Switzerland. As a foreign arbitral award, CAS awards may be judicially recognized and enforced in all countries that have ratified³¹⁰ the New York Convention.³¹¹ Under the New York Convention, only the Swiss Federal Tribunal has the authority to set aside a CAS award.³¹² However, a national court may refuse to recognize and enforce a CAS award if doing so “would be contrary to the public policy of that country.”³¹³ But, as Mitten notes, CAS awards are generally legally recognized and enforced by nation-states³¹⁴ and, to date, attempts to challenge their enforcement have been unsuccessful.³¹⁵

III. GLOBAL SPORTS LAW AS A TRANSNATIONAL AUTONOMOUS LEGAL ORDER

claims, failed to rule on a claim, treated parties unequally, violated a party’s right to be heard, or where a panel’s award is incompatible with Swiss public policy.

³⁰⁹ See *e.g. Raguz v. Sullivan*, 2000 NSWCA 290, whereby two Australian judokas unsuccessfully sought to challenge a CAS award before the New South Wales Court of Appeal. Pursuant to the Commercial Arbitration Act the Court of Appeal had jurisdiction to review an arbitration decision only if the dispute involved a domestic arbitration agreement. However, the Court of Appeal held that because the “seat” of all CAS arbitrations is Lausanne, Switzerland, the arbitration agreement in question could not be deemed a domestic agreement, and thus the CAS decision could not be reviewed.

³¹⁰ More than 140 countries have ratified the New York Convention: United Nations, “The Convention on the Recognition and Enforcement of Foreign Arbitral Awards”, online: <<http://untreaty.un.org/cod/avl/ha/crefaa/crefaa.html>>.

³¹¹ New York Convention, *supra* note 12.

³¹² *Ibid.* at Article V(1)(e), which provides that “the competence authority of the country in which . . . [the] award was made” has jurisdiction to vacate the arbitration award.

³¹³ *Ibid.* at Article V(2)(b).

³¹⁴ As an exception to this general recognition, see *e.g. Slaney v. IAAF*, 244 F.3d 580 (7th Cir. 2001); and *Gatlin v. U.S. Anti-Doping Agency Inc.*, 2008 WL 2567657 (N.D. Fla. 2008). But see *Meca-Medina and Majcen v. Comm’n of European Communities*, [2006] 5 C.M.L.R. 18 (ECJ 3rd Chamber 2006), whereby the European Court of Justice (“ECJ”) permitted two Slovenian swimmers to challenge under EU law a two-year suspension imposed on each of them by CAS for anti-doping rule violations, on the basis that the sanctions were disproportionate. Although the ECJ ultimately rejected the athletes’ claims, the proceeding still amounted to a re-litigation of the issue on grounds outside those set out in the New York Convention: Mitten, Matthew, “Judicial Review of Olympic and International Sport Arbitration Awards: Trends and Observations” (2009) 9 *Pepperdine Dispute Resolution Law Journal* at 19.

³¹⁵ Mitten, *ibid.* See *e.g. Slaney, ibid.* (CAS award upheld and enforced); *Gatlin, ibid.* (CAS award upheld and enforced).

A. Overview

Up to this point, this paper has discussed the globalization of the legal field, in particular, the emergence of an autonomous non-national body of global commercial law, known as *lex mercatoria*. It has theorized how *lex mercatoria*, and possibly other types of global law, exist as self-validating systems of positive law, independent from national legal orders. It has also set out the architecture of the international sport system: its self-regulating hierarchy of private bodies and its delocalized systems of dispute resolution. The purpose of the following section is to examine the extent to which the international sport system exists and operates as an autonomous transnational legal order, alternatively described as “*lex sportiva*”.³¹⁶ It begins with a discussion of the contractual nature of international sport relations as the underlying basis for the creation of a private order. This is followed by an analysis of *lex sportiva* as a self-legitimizing system that produces positive law, independently from the state, and in a manner that is analogous to *lex mercatoria*. The section concludes by raising several implications that naturally flow from viewing *lex sportiva* as an autonomous legal order.

B. *Lex Sportiva*: a Contractual Private Order

³¹⁶ *Lex sportiva* has been used to describe two main concepts: first, the notion of a global or private international sports law (Teubner, *supra* note 4; Beloff, *supra* note 1); Foster, “Global Sports Law”, *supra* note 1); and second, the jurisprudence emerging from CAS, particularly the set of unique sport-specific legal principles alleged to be applied by CAS arbitrators (McLaren, *supra* note 305 at 539; Nafziger, J.A.R., *supra* note 265 at 876). CAS has followed this latter description by referring to aspects of its own jurisprudence as *lex sportiva* (see e.g. *Norwegian Olympic Committee and Confederation of Sports v. International Olympic Committee*, CAS 2002/O/372; and *Miller v. British Cycling Federation*, CAS 2004/A/707). Because a debate remains regarding the existence of sport-specific legal principles in CAS’s jurisprudence (see Erbsen, *supra* note 157) the author relies on the first conceptualization of *lex sportiva*.

The justification underlying *lex sportiva*'s existence as a private global order is rooted in contract.³¹⁷ The web of overlapping agreements, by-laws and regulations that bind the IOC, international sport federations, national Olympic committees, national and regional sport organizations, private anti-doping agencies, and individual athletes, has created a private contractual order, or more accurately, several parallel private contractual orders: the Olympic Movement, the technical rules of sport, and the anti-doping movement. Each private order establishes the reciprocal rights and obligations of these private actors. Further, each order has been accepted by national legal systems as an authoritative regime of private governance that ought to be afforded deference.

With respect to the Olympic Movement, the provisions of the Olympic Charter and the decisions of the IOC constitute the governing rules of this private order. They gain their normative force through the contractual nature and operation of the Olympic Charter, which gives the IOC supreme constitutional jurisdiction and authority over all other members of the Movement, including, international sport federations, national sport organizations, national Olympic committees, and individuals participating in the Olympic Games.³¹⁸ The Olympic Charter acts as an agreement between the IOC and international sport federations, national Olympic committees and Olympic organizing committees, which sets out the mutual rights and responsibilities of each entity in relation to the Olympic Movement.³¹⁹

The rules of the Olympic Charter become binding on national sport organizations and individual athletes in two distinct ways. First, the rules are incorporated, either expressly or impliedly, into

³¹⁷ Foster, "Global Sports Law" *supra* note 1 at 10; Erbsen, *supra* note 157 at 444; Beloff, "Sports Law" *supra* note 1 at 10.

³¹⁸ See *supra* notes 98 to 143.

³¹⁹ *Ibid.*

the by-laws and regulations of international sport federations and national Olympic committees. National sport organizations are required to comply with these by-laws and regulations in order to be recognized as the governing body of a sport in their country.³²⁰ Second, individual athletes expressly consent to the Olympic Charter and the jurisdiction of the IOC by signing formal entry agreements to the Olympic Games.

National legal systems have respected the private autonomy of the Olympic Movement by either refraining from enacting legislation governing national sport bodies, or adopting legislation that recognizes the private authority of the IOC and international sport federations to govern national sport organizations and national Olympic committees.³²¹ Such legislative schemes illustrate a process of *localized globalism*, similar to that which exists in the context of global commercial law.³²²

The technical rules of sport also create a separate contractual private order that parallels the Olympic Movement. In this order, the technical rules of an international sports federation gain their binding force from the hierarchy of regulations between an international sport federation, its member national sport organizations, and their member provincial or regional sport organizations. These technical rules become binding on individual athletes who voluntarily submit to the jurisdiction of their national or regional sport organization through their participation in a sport. A failure to comply with these contractual rules may result in sanctions for both national and regional sport organizations and individual athletes.³²³

³²⁰ *Ibid.*

³²¹ See *supra* notes 147 to 150.

³²² See *supra* note 49 for a discussion of localized globalism in the context of *lex mercatoria*.

³²³ See *supra* note 155 and the discussion contained therein.

The anti-doping movement also exists and operates as a contractual order.³²⁴ The rules governing this private order include the WADA Code and the International Standards (which includes the Prohibited List of Substances).³²⁵ These rules gain their normative force in several ways. First, the WADA Code and the International Standards are binding on their non-governmental signatories, namely, the IOC, international sport federations and private anti-doping agencies.³²⁶ Pursuant to the WADA Code, international sport federations are required to include, in their membership by-laws, a provision requiring national sport organizations to comply with the WADA Code.³²⁷ To satisfy this condition, national sport organizations either create their own anti-doping procedures or submit to the jurisdiction of the private anti-doping agency in their respective country. In turn, individual athletes participating in a sport under the governance of a national sport organization, indirectly assent to these anti-doping rules. Second, the WADA Code has been referentially incorporated into the Olympic Charter and is, therefore, binding on all members of the Olympic Movement. Third, all individuals (athletes, coaches and athlete support personnel) who wish to participate in the Olympic Games must agree to comply with the WADA Code by signing the declaration set out in the Olympic Charter.³²⁸

Noticeably absent from the above contractual relations are states and intergovernmental organizations. Although the UNESCO Convention and the Council of Europe Convention bring aspects of the anti-doping movement within the realm of public international law, specifically, by imposing obligations on states to facilitate anti-doping initiatives within their respective jurisdictions, the movement remains a private order that operates at the fringes of national

³²⁴ In *re CONI*, CAS 2005/C/841 at 12, a CAS panel described the WADA Code as a form of *lex sportiva*.

³²⁵ See *supra* notes 164 to 169.

³²⁶ *Ibid.*

³²⁷ See *supra* note 166.

³²⁸ See *supra* note 176.

legislative and judicial control.³²⁹ The anti-doping movement obtains its normative force from the private contractual relations between nonstate actors in the international sport system, not from any treaty entered into between states. Thus, similar to the Olympic Movement, the role of states in the anti-doping movement has been to facilitate the maintenance of a private sport authority.

These private contractual orders provide procedures for delocalized dispute settlement, which effectively remove sport disputes from review in public judicial settings and place them in the privatized world of sport-specific arbitration. This delocalizing process has been facilitated by compulsory and exclusive arbitration clauses found in the appeal policies of sport bodies, and in the formal agreements signed by athletes prior to their receipt of financial support or their entry into an international competition.³³⁰

In summary, the globalization of sports law has been rooted in several parallel contractual orders that operate within the regulatory hierarchy of the international sport system. Nation states have accepted and, with respect to the anti-doping movement, have actively facilitated the development of these private orders, thus ensuring their autonomy from national legal systems. Further, the use of arbitration clauses within these contractual orders has been effective in preempting the litigation of sport disputes in national courts.

C. *Lex Sportiva* as a Self-Validating System of Positive Law

³²⁹ Erbsen, *supra* note 157 at 446.

³³⁰ For example, prior to their entry into the Olympic Games, all athletes must sign a declaration that all disputes arising in relation to the Olympic Games will be submitted exclusively to CAS: see *supra* note 295.

The preceding section references the relevant rules governing each contractual order. Can these rules exist as valid positive law, without authorization from and control by the state?³³¹ From a positivist legal theory perspective, *lex sportiva* merely describes the customary norms and practices of international sport bodies that can only be transformed into law by the juridical decisions or legislative enactments of nation-states. Thus, *lex sportiva* faces similar obstacles as *lex mercatoria*, and other decentred law making processes, in its quest for validity as an autonomous non-national body of law. The remaining part of this section examines theories that have been used to describe the existence of global sports law as an autonomous legal order, ultimately concluding that only a theory of global legal pluralism is adequate in this regard. This is followed by an application of Teubner's theory of a self-validating legal system to *lex sportiva*, and an analysis of *lex sportiva*'s episodic character to measure its legitimacy as an autonomous legal order.

1. The *Lex Sportiva* Debate

Previous attempts by legal commentators to explain the existence of a global sports law have relied upon theories of customary law.³³² While such theories may provide some insight into why national courts have generally deferred to the rules of the IOC and international sport

³³¹ Attempts to answer this question have been largely absent from the literature on global sports law. Instead, advocates of *lex sportiva* seem to begin with an unstated assumption that the rules of international sport bodies exist as positive law. For example, Erbsen, *supra* note 157, describes the authoritative rules of international sport bodies and the decisions of CAS as positive law, without any discussion of how they claim this status without the sanctioning power of the state.

³³² See Foster, "Lex Sportiva" *supra* note 1 at 421 ("[global sports law] is the custom and practice of international sporting federations. This . . . gives it autonomy from national legal orders"); Johnson, "Book Review" (1989) 60 *British Year Book on International Law* 450 at 451 ("[t]he whole Olympic system . . . operates on the fringe of public international law"); Nafziger, "International Sports Law", *supra* note 226 at 34 ("the Olympic Charter exemplifies current international practice and has the effect of customary international law"); Vedder, "The International Olympic Committee: An Advanced Non-Governmental Organization and the International Law" (1984) 27 *German Year Book on International Law* 233 and 256 (the "IOC can be regarded as exercising quasi-governmental functions. Hence, an internationally autonomous legal order has been established, which, although not public international law, is true international law").

federations, they provide little guidance in understanding how global sports law exists as an autonomous legal order. An inherent limitation of theories of customary law is that they are necessarily state-centric. Customary law theories measure the validity of an international sport body's rules and norms by examining how they are interpreted and treated by national courts. If a sovereign court defers to the authority of a rule, then it is valid law. In effect, theories of customary law assume that the rules emerging from private orders can only be transformed into law under the sanctioning power of the state. In short, such theories act as a barrier to understanding global sports law as positive law in its own right.

Another limitation of theories of customary law is that they are likely only applicable to the Olympic Movement, specifically the rules of the Olympic Charter and the decisions of the IOC.³³³ One explanation for this is that, unlike international sport federations, the IOC is regarded by national courts as a “quasi-state” because of its supreme authority over the Olympic Movement. Foster contends that this ascribed status explains the IOC's diplomatic immunity under principles of international law.³³⁴ However, such a rationale is problematic since it uses positivist legal theories, which stress the structural coupling of state and law, to disguise processes of decentred law making. In other words, if only states can create valid law, then the only reason why the rules of the IOC are recognized as customary law is because the IOC is akin to a state.

Another theoretical argument that could be used to explain the emergence of *lex sportiva* is the notion of a *droit corporatif* of global sport bodies. As noted in part one of this paper, this

³³³ Foster, “Global Sports Law”, *supra* note 1 at 13.

³³⁴ Foster, *ibid.* Rule 1 of the Olympic Charter, *supra* note 92, provides that the IOC is “the supreme authority over the Movement”.

argument has been relied upon by *lex mercatoria* advocates.³³⁵ At first glance, such a theory seems readily applicable to global sports law. The Olympic Movement is essentially a world community of international sport federations, with its own “inner law of associations” in the form of the Olympic Charter, which also acts as a disciplinary code. Any member that violates this inner law may receive several sanctions, including exclusion from the Olympic Movement. However, after a more careful analysis, the over simplicity of this theory becomes evident. The notion of a single global society of sport bodies does not accurately describe the multi-layered hierarchy of global sport, wherein international, national and regional bodies each possess regulatory authority over their respective jurisdictions. Moreover, it is questionable whether this theory could apply to the anti-doping movement, as there is no formal global association of sport bodies committed to the regulation of doping in sport.³³⁶

To conclude, theories of customary law and global corporatism are insufficient to describe the existence of *lex sportiva* as a private legal order that produces positive law. As a result, it becomes necessary to rely on Teubner’s theory of global legal pluralism.

2. Applying Teubner’s Theory of Global Legal Pluralism

(a) *Defining Lex Sportiva*

³³⁵ See *supra* note 52 and the accompanying discussion.

³³⁶ Since the WADA Code is referentially incorporated into the Olympic Charter, and thus binding on all members of the Olympic Movement, the Olympic Movement could serve as the global association for the anti-doping movement. However, this would exclude private anti-doping agencies and international sport federations that are not members of the Olympic Movement, despite still being part of the anti-doping movement.

Similar to *lex mercatoria*, the source of *lex sportiva*'s status as private law rests on the notion of a self-validating contract. Borrowing from Teubner's description of *lex mercatoria*,³³⁷ the following definition of global sports law is provided:

Lex sportiva is the practice of contracting that transcends national boundaries and transforms a merely national law production into a global one. It consists of the Olympic Charter, the WADA Code and the by-laws, rules and regulations of international and national sport bodies that impose binding rights and obligations on private actors in the international sport community. As soon as these contracts claim transnational validity, they are cut off from any pre-existing legal order; however, this is not fatal to their existence. The legal source of their authority is derived from their own self-validation which is ultimately judged and verified through a process of external arbitration that is provided for in the contracts themselves. Emerging from this process is official and organized law that is functionally equivalent to that produced by national legal systems.

Two aspects of this definition require further elaboration, specifically, the criterion of externalization and the notion of contracting as a source of law.

(b) *Externalization*

Teubner notes that the technique of externalization is but one method of remedying the paradox of a self-referencing contract.³³⁸ In the context of global sports law, the majority of conflicts arising from a contract (athlete agreements, by-laws, regulations or codes) are submitted to

³³⁷ See *supra* notes 67 to 75.

³³⁸ Teubner, *supra* note 4 at 16.

external arbitration before a national sport arbitration tribunal or CAS. This is particularly true in the context of the anti-doping movement whereby disputes arising from asserted anti-doping violations must be settled by arbitration.³³⁹ Both CAS and national sport arbitral tribunals satisfy Teubner's criterion of externalization, as they are private, self-created,³⁴⁰ and operate externally and independently from any private sport body.³⁴¹

However, not all states have established external sport-specific arbitration systems to settle every dispute arising at the national sport-level,³⁴² and not all international sport federations exclusively refer every dispute to CAS for binding arbitration.³⁴³ In these instances, disputes are settled through an internal appeal or internal arbitration. Although these processes do not satisfy Teubner's criterion of externalization, they may still remedy the paradox of the self-referencing contract through the alternative de-paradoxification technique of "closed-circuit arbitration". This refers to a process whereby a self-regulatory contract refers conflicts to an internal arbitration body that is identical to the private institution that legislated the contract.³⁴⁴

In short, both externalization and closed-circuit arbitration may be used to justify the self-validating nature of the majority of transnational contracts that exist in sport.

³³⁹ See discussion regarding Articles 8.1 and 22.3 of the WADA Code at *supra* note 243.

³⁴⁰ See *supra* notes 243 to 240 and 266.

³⁴¹ See *supra* note 276 for a discussion on CAS's independence from the IOC.

³⁴² Although the WADA Code requires each private anti-doping agency to provide an arbitration hearing for any person who is alleged to have committed an anti-doping rule violation, this may not mean that an arbitration hearing will be available for other kinds of disputes, such as those involving eligibility or selection matters. For example, in countries without national systems of sport arbitration, FIFA has created the National Dispute Resolution Chamber, which acts as an internal arbitration body that hears disputes between clubs and players regarding contractual and employment issues (see *supra* note 241).

³⁴³ The International Rugby Board ("IRB") uses its own internal appeal process to resolve the majority of its disputes, and only doping-related disputes are referred exclusively to CAS: see IRB Regulation 18 on Disciplinary and Judicial Matters. Similarly, the international federation for boxing ("AIBA") allows an appeal to CAS for disputes with its member national sport federations, however, its own internal arbitral tribunal has exclusive and final jurisdiction over violations of its technical rules and disciplinary sanctions (excluding those relating to doping: see Article 59, AIBA Statutes).

³⁴⁴ Teubner, *supra* note 4 at 17; Foster, "Global Sports Law", *supra* note 1 at 12.

Another aspect of Teubner's criterion of externalization that was not referred to in the above definition, but still equally applicable to sport, is his notion of a transnational contract that references quasi-legislative institutions to form an institution triangle of private 'adjudication', 'legislation' and 'contracting'.³⁴⁵ In athlete agreements, and in the by-laws and regulations of sport bodies, references are frequently made to quasi-legislative institutions in the international sport system. For example, standardized athlete agreements entered into between Canadian national sport organizations and individual athletes reference international sport bodies for the purposes of either expressing the jurisdictional authority that such bodies have over the athlete, or incorporating by reference their rules into the agreement.³⁴⁶ In effect, these references give international sport bodies and their rules quasi-legislative status. Further, they highlight the overlapping legislative authorities that exist in *lex sportiva* (the IOC, international sport federations, and WADA).

(c) Contracting as a Source of Law in Sport

Teubner's assumption that contracting can act as its own source of law is persuasive in the context of international commercial relations wherein transnational or multinational economic actors, of relatively equal bargaining power, alter standardized contracts to create the terms of

³⁴⁵ See *supra* note 77.

³⁴⁶ For example, the Canadian Amateur Rowing Association - 2006 Agreement references the international sport federation for rowing ("FISA"), the Canadian Centre for Ethics in Sport (Canada's anti-doping agency), the Canadian Olympic Committee, and WADA. Similarly, the standardized Canada Basketball Sponsorship Agreement in 2002 referentially incorporates into the agreement the rules legislated by the IOC, the Canadian Olympic Committee, the international federation for basketball ("FIBA"), regarding sponsorship rights. These agreements are on file with the author of this paper.

their bargain.³⁴⁷ However, one wonders whether this assumption is valid in instances where a contract is not freely negotiated between two parties, as is the case in contracts of adhesion.

Foster has raised this concern in the context of international sport by questioning whether Teubner's theory of a self-validating contract can apply to the relationship between athletes and their respective sport governing bodies. Specifically, he argues that it is difficult, if not impossible, to view *lex sportiva* as analogous to *lex mercatoria*, as the former rests on a "fictitious contract".³⁴⁸ Using a sociological analysis to describe the relationship between an athlete and an international sport body, Foster notes:

[a]lthough the relationship between an international sporting federation and an athlete is nominally said to be contractual, the sociological analysis is entirely different. The power relationship between a powerful global international sporting federation, exercising a monopoly over competitive opportunities in the sport, and a single athlete is so unbalanced as to suggest that the legal form of the relationship should not be contractual. Rather like the employment contract, a formal equality disguises a substantive inequality and a reciprocal form belies an asymmetrical relationship.³⁴⁹

This power imbalance has been acknowledged by several legal commentators who have questioned the legal validity of various types of contracts between an athlete and their international and national sport bodies.³⁵⁰ For example, exclusive arbitration clauses found in entry agreements that are unilaterally imposed on athletes prior to their participation in the Olympic Games,³⁵¹ or other international competitions,³⁵² have been challenged in theory for

³⁴⁷ Mustill, *supra* note 39 at 94.

³⁴⁸ Foster, "Global Sports Law", *supra* note 1 at 15.

³⁴⁹ *Ibid.* at 15 to 16.

³⁵⁰ For a similar discussion in the context of NCCA agreements, see Hanlon, S.M., "Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCCA Fouled Out?" (2006) 13 Sports Law Journal 41.

³⁵¹ Blackshaw, Ian, "Arbitration: Olympic athlete consent to CAS arbitration" (2009) 7:11 World Sports Law Report 1 at 2 ("If an athlete, in effect, is forced into agreeing to arbitration by the CAS [*ad hoc* Division] on pain of not being allowed to compete in the Olympic games . . . can his/her consent be said to be real and genuine? It is, I think arguable, that it cannot.")

being non-consensual. Similarly, at the national sport level, contracts expressing the rules and procedures for the selection of athletes to international sporting events have been questioned as a valid source of law because of their adhesive nature.³⁵³

If, as Foster suggests, the contract used to justify *lex sportiva* as an autonomous legal order is “fictitious”, can that contract still act as a source of law under a theory of global legal pluralism? Arguably yes. Concerns about the validity of the imbalanced contractual relationship between athletes and sport bodies are similar in nature to those that reject the validity of a ‘global contract’ for lacking roots in a pre-existing legal order – both are supposed examples of *lex illegitima* (invalid law). Phrased differently, positive law cannot emerge from invalid or non-existent sources of law. Nevertheless, such concerns are easily addressed by Teubner’s theory. A contract between an athlete and a sport body, notwithstanding its adhesive nature, is legitimate because it claims to be so through a process of self-validation, a status which is, in turn, either affirmed or denied through a process of externalization or closed-circuit arbitration that has its own procedures for testing the validity of a contract.

In summary, a theory of global legal pluralism is equally applicable to *lex sportiva* as it is to *lex mercatoria*. It is sufficient to explain the existence of *lex sportiva* as a self-validating system that produces positive law independent from the state.

³⁵² Samuel & Gearhart, *supra* note 215 at 48 to 49 (“If a Swiss sportsman enters a competition organized by a Swiss body and in doing so promises to abide by the rules of an association which contain an arbitration clause that does not appear in the document he signed, the arbitral clause is void under the *Concordat*”).

³⁵³ See e.g. Findlay, Hilary, A., & Mazzucco, Marcus, F. “Degrees of Intervention: Are We Moving Towards a Universal Model of Sport-Specific Decision-Making?” 2010 Yearbook on Arbitration and Mediation (forthcoming):

[Canadian athletes] have little to no authority to participate in the bargaining or negotiation of an Olympic selection agreement, which occurs essentially between the Canadian Olympic Committee and a NSO. Instead, individual athletes are expected to accept the terms of a selection policy, as is, by signing an athlete agreement, which effectively bars them from later challenging such unilaterally imposed terms and conditions contained therein. In essence, then, a selection agreement becomes a contract of adhesion.

3. Measuring the Legitimacy of *Lex Sportiva* as an Autonomous Global Legal Order

In order to measure the extent to which *lex sportiva* is evolving, or has evolved, into a stable autonomous order, it is necessary to assess its episodic character.³⁵⁴ As will be evident, the force of *lex sportiva*'s episodic character exceeds that of *lex mercatoria*, primarily due to its stronger communicative links.

(a) *Links Between Legislative Episodes*

Lex mercatoria's legislative episodes are characterized by a fragmented array of standardized forms within and between trades that creates a patchwork of legal regimes.³⁵⁵ In contrast, *lex sportiva* is comprised of three distinct and parallel contractual orders. Within each order is a harmonized and coordinated set of by-laws, rules and regulations that are all linked together within the regulatory hierarchy of sport. For example, in the case of the anti-doping movement, the WADA Code and its International Standards serve as the model form for the anti-doping rules of all international sport federations, national sport organizations and anti-doping agencies. Similarly, the technical rules of each international sport federation are the global standard for that sport, and are therefore wholly reproduced in the rulebooks of every affiliated national and regional sport organization.

(b) *Links Between Adjudicational Episodes*

Unlike commercial arbitration bodies, sport-specific arbitral bodies are strong not only in producing episodes, but also in connecting them. In sports arbitration, both anecdotal and

³⁵⁴ Teubner, *supra* note 4 at 19.

³⁵⁵ See *supra* notes 81 to 82.

empirical evidence suggest that a system of precedent is developing.³⁵⁶ Indeed, the existence and the significance of a *de facto* doctrine of precedent in sports arbitration was observed early on by a CAS panel, writing:

[Although] in arbitration there is no stare decisis . . . the Panel feels that CAS rulings form a valuable body of case law and can contribute to strengthen legal predictability in international sports law. Therefore, although not binding, previous CAS decisions can, and should, be taken into consideration by subsequent CAS panels, in order to help developing legitimate expectations among sports bodies and athletes.³⁵⁷

The emergence of a body of an authentic case law within CAS and individual national arbitration bodies has largely been facilitated by the publication of arbitration awards.³⁵⁸

While most research on the development of a system of precedent in sports arbitration has examined it as a “horizontal” operation, that is, the development of precedent within a single arbitration body, there is some evidence that a system of precedent could be developing vertically, through a formal and informal hierarchy of arbitration courts. In the anti-doping movement, for example, all arbitrations involving international-level athletes are exclusively appealed from a national arbitration tribunal to CAS.³⁵⁹ Accordingly, CAS rulings on the proportionality of doping sanctions, the validity of certain testing procedures, and the

³⁵⁶ With respect to CAS, see Nafziger, J.A.R., “Lex Sportiva and CAS” in Ian Stewart Blackshaw, Robert C. R. Siekmann & Janwillem Soek, eds., *The Court of Arbitration for Sport, 1984-2004* (The Hague: T.M.C. Asser Press, 2006) 409 at 409; Kaufmann-Kohler, *supra* note 83; Erbsen, *supra* note 157. With respect to the Sport Dispute Resolution Centre of Canada, see Findlay & Mazzucco, *supra* note 353.

³⁵⁷ *UCI v. Jogert*, CAS 1997/176.

³⁵⁸ See *supra* notes 244 and 302.

³⁵⁹ See *supra* note 264.

interpretation of particular rules in the WADA Code, have been treated as precedent by national arbitration tribunals.³⁶⁰

Even outside of the anti-doping movement, where there is no formal hierarchy between CAS and most national arbitration bodies,³⁶¹ the vertical operation of precedent can still be seen.³⁶² In these instances, reliance on CAS decisions as a form of precedent has been out of mutual respect for CAS arbitrators and a desire to create consistency in arbitral decision-making globally.³⁶³

(iii) *Links Between Adjudicational Episodes and 'Legislative' Bodies*

In *lex sportiva*, there is a relatively strong linkage between adjudicational episodes and legislative institutions. This interaction is another example of *lex sportiva*'s greater stability as an autonomous legal order, compared to *lex mercatoria*. In rendering its decisions, CAS often engages in a dialogue with international sport bodies regarding its own normative preferences for how to best regulate international sport.³⁶⁴ In this manner, CAS exercises a supervisory function over the rules and regulations of international sport federations by suggesting amendments to them where necessary. In describing this process Foster notes,

The function of [CAS] . . . is not only to interpret the legislative codes of sports federations, but to select the best examples and create a set of harmonized 'best

³⁶⁰ See e.g. *CCES, Canadian Cycling Association and Government of Canada v. Sheppard*, SDRCC DT-05-0028, 12 December 2005 (citing several CAS awards to demonstrate international sport jurisprudential acceptance of the testing of recombinant erythropoietin); *CCES, Triathlon Canada and Government of Canada v. Boyle*, SDRCC DT 07-0058, 31 May 2007 at 10 (citing a CAS award interpreting a particular anti-doping rule).

³⁶¹ New Zealand is the exception, as it provides for an external appeal process to CAS: see *supra* note 248.

³⁶² See e.g. *Garcia and Ncube v. Canadian Amateur Wrestling Association*, SDRCC 08-0072, 23 April 2008 (citing CAS awards that establish the principle of non-reviewability of the technical decisions of sporting officials); *University of Regina v. CIS*, *supra* note 254 (citing a CAS award applying the doctrine of *contra proferentum* to an ambiguous by-law).

³⁶³ Findlay & Mazzucco, *supra* note 353.

³⁶⁴ See Erbsen, *supra* note 157.

practice' standards. These harmonized standards are then applied to all sports federations, either directly in arbitration awards, or indirectly by encouraging changes to these codes to incorporate the 'best practice'. [CAS] becomes a standards council that leads and regulates the practice of international sporting federations.

A similar supervisory function has been observed in the Canadian sport arbitration system.³⁶⁵

The significance of such linkages between adjudicational episodes and the legislative bodies of sport is that they act as a stabilization mechanism, which, in turn, facilitates the internal or self-contained evolution of *lex sportiva* as an autonomous body of law.

C. Conclusion

In conclusion, *lex sportiva* or global sports law is a private contractual order that produces positive law independently from the state and the rules of public international law. Its existence is justified by its own paradoxical acts of self-validation and by a process of external or closed-circuit arbitration.

If one accepts these assertions as true, then a series of corollary issues arise. First, if global sports law is viewed as official and organized law in its own right, and thus functionally equivalent with the law produced by national legal orders, what happens when it conflicts with national law? Does the transnational status of *lex sportiva* justify it in superseding or displacing national law? How have national courts treated such conflicts? Will the approach of national

³⁶⁵ See Findlay & Mazzucco, *supra* note 353, who note that "While [Canadian sport] arbitrators may be reticent, and may even refuse to rewrite any particular policy or regulation, they remain conscious of their educative role within the sport system by suggesting additions or amendments to a sport body's existing rules and policies." For specific examples, see *Blais v. WTF Taekwondo Association of Canada*, ADR 03-0016, May 2003; *Sergerie v. WTF Taekwondo Assoc of Canada*, SDRCC 03-0026, December 2003; *Wilton v. Softball Canada*, SDRCC 04-0015, July 2004; *Poss v. Synchro Canada*, SDRCC 08-0068, February 2008.

courts to such conflicts change as global sports law continues to evolve into an autonomous legal order? Such questions will be the focus of the remaining parts of this paper.

IV. CASE STUDIES

A. Overview

Conflicts between *lex sportiva* and national legal systems can arise in two forms. First, the rules or decisions of an *international* sport body, such as the IOC or an international federation, can conflict with the laws of a national legal system. In such cases, an action may be brought by an athlete directly against the international body in a national court.³⁶⁶ However, foreign national courts do not automatically have jurisdiction over international sport bodies. As a general rule, a court has territorial competence in a proceeding brought against a sport body that has a corporate presence in that state.³⁶⁷ An international sport body will be deemed to have sufficient corporate presence in a state if it has an agency relationship with a national sport federation incorporated in that state.³⁶⁸ Courts have interpreted the issue of agency as a question of fact that depends on the specific affiliation between an international sport body and its national member in a given

³⁶⁶ See e.g. *Martin v. International Olympic Committee, et al.*, *infra* note 411; *Reynolds v. The Athletics Congress, et al.* (for full length description of the *Reynolds* litigation history see McArdle, David, “Reflections on the Harry Reynolds Litigation” (2003) 2:2 Entertainment Law 90. Note, however, that national sport bodies are typically parties to these proceedings as well.

³⁶⁷ See ss. 3(d) and 7 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. Exceptions to this rule include instances where an international sport body has committed a tort in a state (ss. 3(3) and 10(g)), where it has voluntarily submitted to the court’s jurisdiction (s. 3(b)), or where a dispute centres on a contract that is governed by the law of that state (ss. 3(3) and 10(e)(ii)). Since an international federation is unlikely to voluntarily recognize the jurisdiction of a foreign national court, and since the regulations and by-laws of a sport body are only expressly governed by the laws of the country that the body is incorporated in (usually Swiss law), an international sport body would not be subject to a proceeding in a foreign national court unless it had sufficient corporate presence in that state.

³⁶⁸ *Ibid.* at s. 7(b)(ii). For the application of this principle, see *Reynolds v. The Athletics Congress*, [1994] 23 F.2d 1110; *Behagen v. Amateur Basketball Association* (1984) 744 F.2d 731 (10th Circuit)

dispute.³⁶⁹ Only where a cause of action arises from the actions of a national sport federation, acting solely in its role as agent for an international sport body, will the latter come within the personal jurisdiction of a foreign national court.³⁷⁰

Second, the rules of a *national* sport body, which typically adhere to the rules or decisions of an international federation, can be challenged for conflicting with national law. In such cases, an athlete will likely only bring an action against his or her respective national sport body, rather than its parent international federation. From a jurisdictional perspective, an action against a domestic sport body is much more straightforward than a direct action against an international sport body. However, an action against a national sport body may still be problematic. For instance, a court's decision to set aside the rules of a national sport body may prevent the application of an international federation's rules in that country, and thus disrupt the contractual relations within that private order. Further, such an action has the effect of placing a domestic sport body in a double bind: it is forced to choose between complying with the decision of a court setting aside an impugned rule and risk being sanctioned by its international federation, or complying with the rule of its international federation and risk being held in contempt of court.³⁷¹

How should national courts resolve conflicts between their own laws and *lex sportiva*? On the one hand, sovereign courts have a duty to protect the rights of their citizens, where those rights are threatened by a non-domestic sport body that has a contractual relationship with that citizen. On the other hand, as the international sport system becomes more autonomous and begins to

³⁶⁹ *Ibid.*

³⁷⁰ See *Reynold, ibid.* at para. 76, whereby the Sixth Circuit Court of Appeals held that it did not have personal jurisdiction over the international sport federation for athletics. But see *Behagen, ibid.* at para. 15, whereby the Court came to the opposite conclusion regarding the international federation for basketball.

³⁷¹ See *e.g. Nagra v. Canadian Amateur Boxing Association, infra* notes 380 and 383, and the accompanying discussion.

claim transnational status, challenges to its authority may become more difficult. Indeed, as the vice-president of one international sport federation³⁷² remarked in the context of a court challenge to one of its eligibility determinations, “the Courts create a lot of problems for our anti-doping work, but we don’t care in the least what they say. We have our own rules and they are supreme.”³⁷³

The purpose of the following section is to examine three cases studies involving conflicts between a national legal system and *lex sportiva*. The first two describe conflicts that have been litigated. The third is merely speculative, as there has not yet been any litigation on the apparent conflict.

B. *Nagra v. Canadian Amateur Boxing Association*

In *Nagra v. Canadian Amateur Boxing Association*, a dispute arose involving the eligibility of a Canadian boxer, Nagra, to compete at the national boxing championships hosted by the Canadian Amateur Boxing Association’s (“CABA”) in December, 1999, in Campbell River, British Columbia.³⁷⁴ Since the national championships also served as an Olympic qualifying tournament, it was governed by the technical rules of the international sport federation for

³⁷² Arne Ljungqvist, vice-president of the International Association of Athletics Federations (“IAAF”) from 1981 to 1999.

³⁷³ McArdle, *supra* note 366 at 90.

³⁷⁴ Nagra faced a similar difficulty in competing in the 1999 Ontario boxing championships, where he obtained the provincial light-fly weight title making him eligible for the national championships in British Columbia. The rules of Ontario’s Amateur Boxing Association, being modelled after CABA’s rules, also prohibited Nagra from competing. Nagra filed a successful complaint with the Ontario Human Rights Tribunal, which held that the clean shaven rule was contrary to Nagra’s human rights and that Nagra was eligible to compete in the provincial championships, provided that he wore the appropriate netting over his beard during the competition: Haslip, Susan, “A Consideration of the Need for a National Dispute Resolution System for National Sport Organizations in Canada” (2000) 11 *Marquette Sports Law Review* 245 at 260.

boxing, the Association Internationale de Boxe Amateur (the “AIBA”).³⁷⁵ However, as the national governing body for boxing in Canada, CABA was responsible for enforcing these technical rules.

The technical rules of the AIBA require a boxer to receive a medical examination prior to the weigh-in stage of the competition.³⁷⁶ However, in order to pass this medical examination a boxer must be clean shaven.³⁷⁷ As a member of the AIBA, CABA had a similar clean shaven rule in its regulations.³⁷⁸

Nagra was the Ontario provincial champion in light-fly weight division. As a practicing Sikh, he was required to “maintain unshorn hair” pursuant to the tenets of his religion.³⁷⁹ As he was familiar with the rules of CABA, Nagra anticipated that he would be ineligible to compete at the national championships, despite being eligible in all other respects. Accordingly, he sought and obtained an interim order from the Ontario Superior Court on December 1, 1999, requiring CABA to allow him to box in the national championships, notwithstanding any beard he may have at the date of the competition.³⁸⁰ However, this put CABA in a conflicting situation as it was forced to either follow the court’s order and risk being sanctioned by the AIBA for non-

³⁷⁵ At this time of the dispute, AIBA headquarters were in Atlanta, the United States. However, since 2002, its headquarters have been in Lausanne, Switzerland. The AIBA is now an association under Article 60 ff. of the Swiss Civil Code.

³⁷⁶ Rule 4, AIBA Technical Rules, Effective from September 1, 2008.

³⁷⁷ *Ibid*, Rule 2.3.3.2.

³⁷⁸ Haslip, *supra* note 374 at 259. It is unclear as to whether CABA continues to have this clean shaven rule, or whether an exception has since been made for boxers that wear a beard for “legitimate and bona fide religious reasons”. However, the rule is still part of the AIBA’s rulebook: see AIBA Rules, *ibid*.

³⁷⁹ Ontario Today: Bearded Etobicoke Sikh Boxer Shut Out (CBC-R radio broadcast, December 2, 1999), cited in *Ibid*. at 260.

³⁸⁰ *Nagra v. Canadian Amateur Boxing Association*, 99-CV-180990 (Ont. Sup. Ct., December 1, 1999).

compliance with its technical rules,³⁸¹ or disregard the court's order and risk being held in contempt of court. Further, any otherwise eligible boxer that competed against Nagra at the national championships could be sanctioned by the AIBA under its 'contamination' rule.³⁸²

In response to this dilemma, CABA postponed the light-fly weight division event until the next scheduled tournament in January, 2000, in St. Catharines, Ontario. This decision prompted Nagra to return to the Ontario Superior Court to obtain another court order permitting him to compete in the St. Catharines tournament.

In granting the order allowing Nagra to compete,³⁸³ Justice Low declared that CABA's rules, which effectively prohibited from competition any boxer wearing a beard "for legitimate and bona fide religious reasons", were "inconsistent with the principles and tenets of Canadian human rights law and the Canadian Charter of Human Rights and Freedoms."³⁸⁴ No submissions were made by CABA opposing or consenting to the motion and, despite being properly served, no one appeared on behalf of CABA.³⁸⁵

In the end, CABA complied with the order and agreed to let Nagra compete at the St. Catharines tournament, and was not sanctioned by the AIBA.³⁸⁶

³⁸¹ Article 38 of the AIBA Disciplinary Code currently provide that if a national sport federation permits an ineligible boxer to take part in a competition, it will be fined between 4'000 to 6'000 CHF. In addition, Articles 5 and 45 provide that a national sport federation could be suspended or excluded from membership for violations of AIBA's regulations.

³⁸² Haslip, *supra* note 374 at 260. See also *supra* note 155.

³⁸³ The order was conditional on Nagra containing his beard in the appropriate netting: *Nagra v. Canadian Amateur Boxing Association*, [2000] O.J. No. 850 (Ct. J.) at para. 1.

³⁸⁴ *Ibid.* at para. 2.2.

³⁸⁵ *Ibid.* at para. 2.

³⁸⁶ Natalie James, "Sikh boxer beards CABA in its own den, wins court case" *Indian Express Newspapers (Bombay) Ltd.* (14 January 2000), online: <<http://www.expressindia.com/news/ie/daily/20000114/isp14015.html>>. Note, however, that the AIBA did indirectly threaten to disqualify CABA in an interview with Reuters. The Secretary

C. *Sagen v. VANOC*

*Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games*³⁸⁷

involved a dispute surrounding the exclusion of women's ski jumping from the Programme of the 2010 Winter Olympic Games in Vancouver, British Columbia.³⁸⁸

In 2006, the IOC's Olympic Programme Commission (the "Commission")³⁸⁹ considered several applications to add new events to the 2010 Olympic Programme, including women's ski jumping. A number of criteria, as set out in the Olympic Charter,³⁹⁰ were used to determine whether a new sport, event or discipline should be added to the Olympic Programme. One such criterion was "universality", which assesses the number of countries and continents that practice a particular sport, event or discipline. Due to the historical disadvantage of women in sports, the Olympic Charter provided a lower 'universality' standard for the inclusion of new women's events than it did for new men's events.³⁹¹ Despite this, the Commission found that women's ski jumping lacked "the international spread of participation and technical standard" to satisfy the lower standard.³⁹² Accordingly, in its report to the IOC Executive Board, the Commission

General of the AIBA, stated: "[CABA] must understand that if they did advance [Nagra] (to the Olympic qualifying rounds), they will be disqualified": *ibid.*

³⁸⁷ *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games*, 2009 BCSC 942 ["*Sagen BCSC*"]; *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games*, 2009 BCCA 552 ["*Sagen BCCA*"].

³⁸⁸ Men's ski jumping has been included in the Olympic since 1924; however, women's ski jumping has never been included in the Olympic Programme.

³⁸⁹ The IOC Program Commission provides recommendations concerning the inclusion of new sports, events and disciplines to the IOC Executive Board, which has the ultimate authority over the content of the Olympic Programme.

³⁹⁰ Rule 47 of the 2004 Olympic Charter. Note that the rules governing admission of sports, events and disciplines into the Olympic Programme was removed during the last edition of the Olympic Charter.

³⁹¹ *Sagen BCSC*, *supra* note 387 at para. 99.

³⁹² *Sagen BCCA*, *supra* note 387 at para. 19. Currently, there are 146 active female ski jumpers registered with the international federation for skiing, and a total of 206 women that are start authorized. Most are from European countries, but Canada, the United States and Japan are also represented: Douglas Pizac, "History of Women's Ski Jumping", *The Globe and Mail* (10 July 2009).

recommended against including women's ski jumping in the 2010 Olympic Programme. The IOC Executive Board accepted the Commission's recommendation.³⁹³

The decision of the IOC's Executive Board prompted a group of female ski jumpers to appeal the decision.³⁹⁴ Pursuant to the Olympic Charter, the majority of disputes arising from the decisions of the IOC are exclusively appealed to the IOC Executive Board.³⁹⁵ In dismissing the athletes' appeal, the IOC Executive Board, in effect, affirmed its own decision.

Determined to pursue further legal recourse,³⁹⁶ a group of fifteen female ski jumpers from Canada, Norway, Germany, Slovenia and the United States (the "Plaintiffs"), filed an application in the British Columbia Supreme Court against the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games ("VANOC"), seeking the following declaratory order:

[I]f VANOC plans, organizes, finances and stages ski jumping events for men in the 2010 Winter Olympic, then a failure to plan, organize finance and stage a ski jumping event for women violates their equality rights, as guaranteed in section 15(1) of the *Canadian Charter of Rights and Freedoms*, and is not saved under s. 1.³⁹⁷

³⁹³ Despite this conclusion, the IOC Executive Board expressly noted in a press release that "it would be closely following the development of Women Ski Jumping with a view of its inclusion in future Olympic Games": *Sagen BCSC*, *supra* note 387 at para. 20. For example, IOC President Jacques Rogge has promised that women's ski jumping will be included in the inaugural Winter Youth Olympics in Innsbruck, Austria in 2012.

³⁹⁴ Jack Dempsey, "IOC still says no to women ski jumper", *The Globe and Mail* (September 18, 2009).

³⁹⁵ Olympic Charter, *supra* note 387 at Rule 15.4. However, in certain cases, disputes may be appealed to CAS (see *supra* note 113). One wonders whether the female ski jumpers attempted to appeal the IOC Executive Board's decision to CAS. On a liberal interpretation of Rule 59 of the Olympic Charter ("any dispute arising on the occasion of, or in connection with the Olympic Games shall be submitted exclusively to [CAS]") such an external appeal is contemplated. Moreover, based on basic principles of natural justice or due process any appeal of a decision of the IOC Executive Board would need to be heard by an external adjudicator, or, at the very least, a differently constituted internal panel, to ensure impartiality.

³⁹⁶ Prior to their filing an application in the British Columbia Supreme Court, the mother of one of the Plaintiffs commenced a human rights complaint against the Government of Canada before the Canadian Human Rights Commission. The complainant and the Government of Canada settled in the course of mediation, with Canada agreeing to lobby the IOC for the inclusion of women's ski jumping in the Olympic Programme: *Sagen BCSC*, *supra* note 387 at 119.

³⁹⁷ *Sagen BCSC*, *supra* note 387 at para. 3.

The Plaintiffs acknowledged that if this declaration was granted, then the only way VANOC could comply with the Court's decision would be to refuse to host the men's ski jumping events, as it does not have the authority to add events to the Olympic Programme.³⁹⁸ This fact was acknowledged by Justice Fenlon when she commented on the IOC's broad jurisdiction over the Olympic Movement:

[I]f VANOC tried to hold a women's ski jumping event without the IOC's permission, VANOC could not make that event happen. The actual staging of Olympic events requires not only the local organizing committees' efforts, but also participation by all international sports federations and the national Olympic committees, all of whom are part of the Olympic movement and are under the authority of the IOC . . . The FIS, the international federation responsible for ski jumping, has specifically stated that it has accepted the IOC's decision with respect to women's ski jumping; it has reiterated in the context of this litigation that the FIS is under the authority and instructions of the IOC; it says that the IOC determines the Olympic Programme and that it will not take instructions from VANOC in this regard.

Similarly, it is the national Olympic committees that select the athletes to be brought to the 2010 Games on their national teams. Those committees are the IOC's ambassadors in their respective countries. They receive most of their funding from the IOC; they are subject to its authority and instructions. If VANOC attempted to hold a women's ski jumping event at the 2010 Games, it is most unlikely that the national Olympic committees would act contrary to the direction of the IOC.³⁹⁹

In dismissing the Plaintiffs' claim, Justice Fenlon held that although the *Canadian Charter of Rights and Freedoms* (the "*Canadian Charter*") applied to VANOC,⁴⁰⁰ and although the decision

³⁹⁸ *Ibid.* at para. 5. The notion that VANOC has the power to remove men's ski jumping from the 2010 Games was later rejected by Justice Fenlon at para. 127. Thus, even if the declaratory order was made, it would likely have no practical effect on the staging of the 2010 Olympic Games.

³⁹⁹ *Ibid.* at paras. 117 and 118.

⁴⁰⁰ Applying the "ascribed activity test" (see *McKinley v. University of Guelph*, [1990] 3 S.C.R. 229 at 274), Justice Fenlon (*supra* note 387 at para. 65), found that the *Canadian Charter* applies to VANOC when it is carrying out a government activity, namely the planning, organizing, financing and staging the 2010 Olympics.

not to include women's ski jumping was discriminatory in a substantive sense,⁴⁰¹ VANOC did not breach the *Canadian Charter*. This conclusion was based on her finding of law that an entity could not be in breach of the *Canadian Charter* in respect of a decision that it had no control over.⁴⁰² Therefore, since VANOC had no power to order the inclusion of women's ski jumping into the Olympic Programme it could not be held to have breached s. 15(1). Having found no breach of s. 15(1), Justice Fenlon did not address arguments made under s. 1.⁴⁰³

The Plaintiffs appealed Justice Fenlon's decision to the British Columbia Court of Appeal.⁴⁰⁴ In dismissing their appeal, the Court of Appeal held that "the *Canadian Charter* does not apply to the selection of events for the 2010 Olympic Games"⁴⁰⁵ and that, even if it did apply, the failure to include women's ski jumping event would not constitute a breach of s. 15(1).⁴⁰⁶

⁴⁰¹ Justice Fenlon applied the two-stage *Law* test (see *R. v. Kapp*, [2008] S.C.R. 483) to reach this conclusion. At the first stage of the test, she found that male ski jumpers were being treated more favourably than female ski jumpers by having an ski jumping event at the 2010 Olympics, and that this differential treatment was based on the enumerated ground of sex. At the second stage of the test, Justice Fenlon held that Rule 47(4.4) of the Olympic Charter, which was the source of the differential treatment of female ski jumpers, perpetuated the historical prejudice against women in sport, and was thus discriminatory. She notes that prior to the adoption of Rule 47, men's ski jumping was already included in the Olympics. When Rule 47 was adopted, subrule (4.4) permitted the continued inclusion of events, such as men's ski jumping, that had traditionally been part of the Olympics, even if they did not meet the new inclusion criteria (e.g. "universality"). However, when the exception under subrule (4.4) was adopted, the number of Olympic events for men vastly outnumbered those for women, since women's participation at the Olympics was limited to events considered "particularly appropriate to the female sex". Therefore, due to the historical stereotyping and prejudice that prevented women from participating in ski jumping prior to the adoption of Rule 47, women's ski jumping could not qualify for inclusion under subrule (4.4).

⁴⁰² See *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, at para. 37.

⁴⁰³ *Sagen BCSC*, *supra* note 387 at para. 130.

⁴⁰⁴ *Sagen BCCA*, *supra* note 18. The appellants submitted that Justice Fenlon erred in law when she concluded that their rights under s. 15(1) of the *Canadian Charter* are not violated by VANOC's hosting of only men's ski jumping events.

⁴⁰⁵ Specifically, the Court of Appeal found, at para. 49, that although the planning, organizing, financing and staging the 2010 Games may be considered a government activity for the purposes of the *Canadian Charter*, the impugned decision not to include women's ski jumping in the Olympic Programme was in no way part of VANOC's planning, organizing, financing or staging of the 2010 Games.

⁴⁰⁶ *Ibid.* at para. 6. Specifically, the Court of Appeal notes that s. 15(1) of the *Canadian Charter* only guarantees equality with respect to a "benefit of the law", writing at para. 56:

[T]he right to compete in a ski jumping event at the Olympic Games does not appear to be a 'benefit of the law'. It is not a right deriving from legislation, nor is it conferred by a

The Plaintiffs' application for leave to appeal to the Supreme Court of Canada was denied in December, 2009.⁴⁰⁷

Although the decisions of both the trial and appellate courts in *Sagen* demonstrate a general acknowledgement and acceptance of the IOC's exclusive jurisdiction over the Olympic Movement, the difficulties inherent in using the *Canadian Charter* to regulate the conduct of a private entity, such as VANOC, limits the analytical value of the decisions in the context of this paper. Therefore, it is necessary to query what the outcome of *Sagen* might have been had another Canadian statute or the common law been used to challenge VANOC's implementation of the IOC's decision to exclude women's ski jumping from the 2010 Games.⁴⁰⁸ It is possible that a Canadian court would have followed the deferential approach taken by other national courts, by refusing to intervene in the private sphere of the IOC and the Olympic Movement.⁴⁰⁹

For instance, in *Martin v. International Olympic Committee, at al.*,⁴¹⁰ two runners' organizations and eighty-two women from twenty-seven counties (the "Plaintiffs") sought a preliminary

governmental entity. Instead, it derives from a decision by the IOC to hold an event. It is not suggested that the IOC is a law-making body. Further, the IOC's decision not to hold a women's ski jumping event at the 2010 Games is a decision that has not been endorsed by VANOC, or by any Canadian government body [emphasis added].

Although the Court of Appeal avoided considering whether the decisions of the IOC constitute law in their own right, this is not determinative of its conclusion that the availability of ski jumping events is not a "benefit of the law". The Court notes (at para. 66) that the definition of "law" under s. 15(1) only includes the policies and practices that the Canadian government has jurisdiction to enact or change.

⁴⁰⁷ The Appellants memorandum to the Supreme Court of Canada seeking leave to appeal is on file with the author of this paper. For the decision dismissing the Plaintiffs' application, see [2009] S.C.C.A. No. 459.

⁴⁰⁸ Arguably, the *Canadian Human Rights Act* would have been a more suitable alternative, however, following the mediated settlement between the ski jumpers and the Government of Canada (see *supra* note 396), the Plaintiffs were likely prohibited from bringing an action using human rights legislation.

⁴⁰⁹ Indeed, in *Sagen*, Justice Fenlon at para. 56 of her decision cites *Martin* (see *infra* note 410). See also *supra* note 226, regarding the Belgium court that acknowledged that the rules of the IOC displaced its own national law.

⁴¹⁰ *Martin v. International Olympic Committee et al.* (1984), 740 F.2d 670 [*Martin*].

injunction against the IOC,⁴¹¹ that would require the organizers of the 1984 Los Angeles Olympics to include 5,000 and 10,000 meter track events for women. The district court denied the Plaintiffs' application. On appeal to the Ninth Circuit Court of Appeals, the Plaintiffs argued that because 5,000 and 10,000 meter events had been scheduled for men, the failure to include these events for women constituted gender-based discrimination that violated their equality rights under the Fifth and Fourteenth Amendments. In dismissing their appeal, the Court demonstrated deference to the inherent authority of the Olympic Charter as a private contractual order, writing:

[W]e find persuasive the argument that a court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international agreement – the Olympic Charter. We are extremely hesitant to undertake the application of one state's statute to alter an event that is staged with competitors from the entire world under the terms of that agreement.⁴¹²

The Court's refusal to permit its own national laws to displace the 'law' of the Olympic Movement (i.e. the IOC's decisions under the Olympic Charter) illustrates its validity as an autonomous body of authoritative global law.

In addition to the persuasiveness of the *Martin* decision, a Canadian court may also be reluctant to oust the law of the Olympic Movement where it conflicts with Canadian law, based on policy considerations. As Richard Pound notes, had the Court of Appeal in *Sagen* made a declaration ordering VANOC to either organize a female ski jumping event or refuse to stage men's ski

⁴¹¹ In addition to the IOC, the other Defendant-Respondents included the United States Olympic Committee, the Athletic Congress of the United States, and the Los Angeles Olympic Committee.

⁴¹² *Martin*, supra note 410 at para. 22.

jumping events, it would have eliminated Canada's chances of hosting another Olympics.⁴¹³ As an example, the City of Toronto was recently selected to host the 2015 Pan American Games,⁴¹⁴ and has plans to make a bid to host the Summer Olympic Games in the future. Thus, maintaining good relations with the IOC would be prudent. It is foreseeable that such a policy consideration could have some influence on an Ontario court (or any Canadian court).

In summary, although the *Sagen* decisions are of limited value in understanding what a Canadian court would do where a conflict arose between a federal or provincial law and the Olympic Charter or a decision of the IOC, the approach taken by other national courts combined with the desire to maintain strong political relations with the IOC, suggest that a court may refuse to intervene in most circumstances.

D. UK *Gender Recognition Act* and the IOC Policy on Transsexuals in Sport

The last conflict of laws example involves an inconsistency between the United Kingdom's *Gender Recognition Act 2004*,⁴¹⁵ and the IOC's policy on the participation of transsexuals in the Olympic Games. There is a concern is that this conflict may lead to legal challenges in English courts at the forthcoming London 2012 Olympic Games.⁴¹⁶

1. The *Gender Recognition Act, 2004*

⁴¹³ Lee, Jeff, "Pound: Ski jumping fight jeopardizes Canada's future as Olympic hosts", *Windsor Star* (8 October, 2009).

⁴¹⁴ The Pan American Games are under the patronage of the IOC and are thus considered part of the Olympic Movement.

⁴¹⁵ *Gender Recognition Act 2004* (c. 7) [GRA].

⁴¹⁶ Coggon, John, Natasha, Hammond, & Holm, Soren, "Transsexuals in Sport - Fairness and Freedom, Regulation and Law" (2008) 2:1 Sport, Ethics and Philosophy 4; Charlish, Peter, "Gender Recognition Act 2004: Transsexuals in Sport - A Level Playing Field?" (2005) 2 International Sports Law Review 38.

The *Gender Recognition Act 2004* (the “*GRA*”) was enacted following the seminal decisions of the European Court of Human Rights in 2002 in the cases of *Goodwin v. The UK* and *I v. The UK*.⁴¹⁷ The purpose of the *GRA* is “to provide transsexual people with legal recognition in their acquired gender”.⁴¹⁸ It sets out the certification procedure required for a person to be recognized as his or her new acquired sex. One of the most significant aspects of this procedure is that there is no requirement for a person to have undergone a full sex reassignment surgery, gonadectomy or hormonal treatment to be recognized in the opposite sex.⁴¹⁹ In other words, “a person can, at least in theory, be legally recognized in his/her new sex while maintaining the biological physical characteristics of the sex into which he/she was born.”⁴²⁰

The drafters of the *GRA* must have been cognizant of the potential implications that this certification regime would have in the context of sport. As Coggon et al. note, a male-to-female transsexual who has been legally recognized as female, but who maintains all of the biological characteristics of a male,⁴²¹ could have a competitive advantage over her female-born competitors.⁴²² To address this concern, s. 19 of the *GRA* permits the governing body of a “gender-affected sport”⁴²³ to prohibit or restrict the participation of transsexuals that have acquired a new gender under the *GRA*, if it is necessary to secure “fair competition” or “the safety of competitors” at a sporting event.

⁴¹⁷ (2002) 35 EHRR 18, (2003) 36 EHRR 53. The European Court of Human Rights held that there was no justification for barring a transsexual from enjoying the right to marry.

⁴¹⁸ Explanatory Notes of the *Gender Recognition Act 2004*, available online: <http://www.opsi.gov.uk/acts/acts2004/en/ukpgaen_20040007_en.pdf>

⁴¹⁹ Coggon et al. *supra* note 416 at 11.

⁴²⁰ *Ibid.*

⁴²¹ For example, a pre-operative male-to-female transsexual could have a more advantageous testosterone to estrogen ratio, greater muscle mass and superior height.

⁴²² *Ibid.*

⁴²³ “A sport is a “gender-affected sport” if the physical strength, stamina or physique of average persons of one gender would put them at a disadvantage to average persons of the other gender as competitors in events involving the sport”: *GRA*, *supra* note 415 at s. 19(4).

2. The IOC Policy

In 2004, the IOC amended its policy on the participation of transsexuals in the Olympic Games (the “IOC policy”).⁴²⁴ The policy distinguishes between pre- and post-pubescent transsexuals.⁴²⁵

An athlete that has undergone sex reassignment surgery before puberty is regarded as belonging to the corresponding gender, and is eligible to compete at the Olympics in that gender.⁴²⁶ No other conditions are imposed on these transsexuals. In contrast, an athlete that has undergone sex reassignment surgery after puberty is eligible to compete in the Olympics, subject to the following conditions:

- surgical anatomical changes have been completed, including external genitalia changes and gonadectomy;
- legal recognition of their assigned sex has been conferred by the appropriate official authorities;
- hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for a sufficient length of time to minimise gender-related advantages in sport competitions;
- eligibility should begin no sooner than two years after gonadectomy; and
- a confidential case by case evaluation will occur.⁴²⁷

3. The Conflict

⁴²⁴ See “Transsexual athletes OK for Athens”, CNN news report (Tuesday, May 18, 2004), online: <<http://edition.cnn.com/2004/SPORT/05/17/olympics.transsexual/>>.

⁴²⁵ The “Explanatory note to the recommendation on sex reassignment and sports” states that there is a distinction to be made between pre- and post-pubescent sex reassignment transsexuals because of the influence of hormones of their former gender during puberty: available online: <http://multimedia.olympic.org/pdf/en_report_904.pdf>.

⁴²⁶ Coggon et al., *supra* note 416 at 12.

⁴²⁷ CNN, *supra* note 424.

The conflict between the *GRA* and the IOC policy is readily apparent. Under the *GRA* a British transsexual athlete may gain legal recognition of their acquired gender without sex reassignment surgery. However, that same athlete would be ineligible to compete in the Olympic Games in their legally recognized gender due to the IOC policy, which requires them to have had sex reassignment surgery at least two years prior to their participation.⁴²⁸ Although the IOC policy affords some flexibility in its application by providing for a case by case evaluation, the requirement to have undergone sex reassignment surgery is most likely unavoidable.⁴²⁹

Coggon et al. note that legal challenges to the IOC policy may occur in two ways.⁴³⁰ First, a British pre-operative transsexual that is legally recognized under the *GRA* may directly challenge the IOC policy on the basis that it is contrary to the European Convention on Human Rights (“ECHR”).⁴³¹ Practically speaking, however, it is likely that such a challenge would now be brought under the UK *Human Rights Act* (“*HRA*”),⁴³² which incorporates the ECHR into domestic law. Section 6 of the *HRA* prohibits a “public authority”, defined to include an entity carrying out functions of a public nature, from acting in a way that violates a Convention right. It is uncertain as to whether the IOC would constitute a “public authority” under the *HRA*. Although the IOC undoubtedly carries out many functions that may be construed to be of a “public nature,” it is unlikely to fall within the ambit of the *HRA* as it is an extra-territorial entity. Thus, it is more likely that an athlete challenging the IOC policy would bring an action directly against the London Organizing Committee of the Olympic Games (“*LOCOG*”), for its

⁴²⁸ Coggon et al., *supra* note 416 at 13; Charlish, *supra* note 416 at 42.

⁴²⁹ Coggon et al., *ibid.* at 13.

⁴³⁰ *Ibid.*

⁴³¹ Council of Europe, *European Convention on Human Rights* [ECHR]. Specifically, Article 8 of the *ECHR* which protects one’s right to privacy and Article 14, which protects one’s right to equal protection under the law.

⁴³² *Human Rights Act 1998* (c. 42), see s. 1.(1)(a) [*HRA*].

implementation of the policy. Unlike the IOC, LOCOG is a public authority that clearly falls within the scope of the *HRA* and is thus obliged to respect the protections contained therein. However, there remains a central barrier to such a challenge. The LOCOG could argue that its implementation of the IOC policy is authorized under s. 19 of the *GRA*, on the basis that the sex-reassignment requirement for post-puberty transsexuals is necessary to “secure fair competition” at the Olympic Games. Since the *HRA* cannot be used to invalidate primary legislation,⁴³³ such as the *GRA*, and does not apply to public authorities acting to enforce provisions of primary legislation that contravene Convention rights,⁴³⁴ this may be a successful defence for LOCOG.

Second, a transsexual athlete might seek to challenge the IOC and/or LOCOG by claiming that they are breaching the *GRA* in regulating and staging the Olympic Games.⁴³⁵ Article 54 of the UK Department for Culture, Media and Sport’s policy directive for sport bodies on transsexual people and sport provides that “[a]ny body regulating entry into competitions in the UK must also comply with the stricter requirements of the *GRA*. . .”⁴³⁶ The broad wording of this provision suggests that the *GRA* is intended to apply to non-domestic sport bodies, such as the IOC or an international sport federation, which have authority over the entry of athletes into international competitions hosted in the UK.⁴³⁷ Again, however, such a claim is likely to run into several obstacles. First, it is unclear whether the IOC, as a transnational entity based in

⁴³³ *Ibid.* at s. 3(2)(c).

⁴³⁴ *Ibid.* at s. 6(2)(b).

⁴³⁵ Coggon et al., *supra* note 416 at 14.

⁴³⁶ Department for Culture, Media and Sport, Sport Division, “Transsexual people and sport - Guidance for sporting bodies”, 1 May 2005, available online: <http://www.uksport.gov.uk/assets/File/Generic_Template_Documents/Standards_in_Sport/transsexuals.pdf>.

⁴³⁷ Olympic Charter, *supra* note 92 at Rule 45.2 provides that the IOC has the ultimate authority over the entry of athletes to the Olympic Games. See also *Melinte v. International Amateur Athletic Federation*, CAS OG Sydney 2000/015, whereby the IOC refused to allow a provisionally suspended athlete to compete in the Olympics, even though her international sport federation was willing to let her compete.

Switzerland with an emerging quasi-international legal personality,⁴³⁸ would be within the jurisdiction of English courts. However, it is likely that the staging of the Olympic Games in London and/or the IOC's agency-like relationship with LOCOG would bring the IOC within the territorial competence of an English court. Second, assuming that the IOC is not triable in an English court, only the actions of LOCOG in staging the Olympic Games could be challenged for breaching the *GRA*. However, similar to *Sagen*, this raises a corollary issue, namely, whether an entity can be held to be in breach of a statute in respect of a decision that it does not have the power to make. Third, even if an action could be brought directly against the IOC and/or LOCOG in an English court, the IOC could argue that Rule 34.3 of the Olympic Charter prevents an English court from challenging the IOC policy. Rule 34.3 provides that "the National Government of the country of any [city applying to host the Olympics] must submit to the IOC a legally binding instrument by which the said government undertakes and guarantees that the country and its public authorities will comply with and respect the Olympic Charter." Assuming that the UK Government did enter into such a binding instrument, it would seemingly be obliged to create an exemption under the *GRA* for the IOC and LOCOG during the staging of the Olympic Games. Finally, the IOC can rely on the aforementioned argument that its policy conforms to s. 19 of the *GRA* as being necessary to secure fair competition at the Olympic Games.

E. Discussion

The three preceding case studies illustrate that the ability of national courts to resolve conflicts between *lex sportiva* and their own national law is not a straightforward matter. From a purely

⁴³⁸ See *infra* note 451 and its accompanying discussion on the international legal personality of the IOC.

jurisdictional perspective, it will not always be possible for an athlete to directly challenge an international sport body's decisions or rules. The scope of a foreign national court's jurisdiction over the IOC and international sport federations depends on the facts of a particular dispute and whether the IOC or an IF has sufficient corporate presence in that state. Yet, even where an international sport body is within the territorial competence of a foreign national court, any order against it will only be binding in that country, and thus of limited practical value. For example, had the AIBA been a party to the proceedings in *Nagra*, any order striking down its clean shaven rule would only apply to AIBA sanctioned boxing events held in Canada. Indeed, the decision in *Nagra* has not prevented the AIBA from retaining its clean shaven rule. The rule continues to be imposed on other national sport organizations and is still an eligibility requirement that all athletes must comply with in order to compete at internationally sanctioned boxing competitions, such as the Olympics and the World Championships.

Similarly, indirect challenges to the rules of international sport bodies through actions against national and regional sport organizations also present their own difficulties. Depending on the legal basis for the action, a court may be unable to hold a national sport body liable for contravening a national law if that body had no control over the decision giving rise to the breach, as was found by the British Columbia Supreme Court in *Sagen*. However, this finding may be limited to the unique factual and legal context of *Sagen*; specifically, the lack of authority of an Olympic organizing committee over the staging of the Olympic Games, and the law governing the application of the *Canadian Charter*.

Even where a court could set aside the rules of a national sport body because they conflict with national law, several policy considerations may prevent it from doing so. First, an order setting aside a technical rule that is imposed by an international sport federation can put a national sport

body in a conflicting situation. In order to comply with such an order a national sport organization is forced to breach its contractual obligations to its international federation. This, in turn, may result in a sanction being imposed on a national sport organization, which could include a fine, or even suspension or expulsion from the international sport federation. Second, athletes that wish to compete in internationally sanctioned competitions must belong to a national sport federation that is in good standing with an international federation. Thus, if a national sport organization was suspended or expelled from an international federation, then all athletes belonging to that national organization would be barred from competing in the Olympic Games or any other major international competition. Third, a court order that indirectly prevents athletes from competing in international-level competitions would frustrate the purpose behind government funding of Olympic sport programs. Considering the substantial amount of public funds that are invested in Olympic sports in many countries, this would be an undesirable result.

Aside from these practical considerations, from a socio-legal perspective, there may be additional reasons why a national court should exercise restraint in attempting to resolve these types of conflicts. The ability of a national court to unilaterally alter the substance of global sports law to ensure its compliance with its own national law is arguably inconsistent with the existence of a global or transnational legal order. This is not solely because global law has been traditionally conceptualized as emerging from social peripheries rather than from nation states. In reality, states have played an important role in facilitating the globalization of sports law, particularly in the case of the anti-doping movement. Instead, it is problematic because it suggests that a single state could alter the private contractual order of a global society. This concern is particularly relevant in the context of the Olympic Games since a court in the host country could, in theory, make an order altering the staging of the Olympics that would be

binding on the IOC and effect all members of the Olympic Movement. The widespread implications of such an order were astutely noted by the Court in *Martin* when justifying its refusal to use the United States Constitution to alter the Olympic Programme.⁴³⁹ Mitten notes that other courts have taken a similarly deferential position towards global sports law, recognizing that “there is no place for nationalism and ethnocentrism in the legal regulation of Olympic and international sport.”⁴⁴⁰

Another concern that arises from a national court’s alteration or displacement of the rules of sport bodies relates to its effect on *lex sportiva*’s episodic character. As alluded to earlier, one of the strengths of *lex sportiva* as an autonomous legal order is the interconnectedness of its legislative episodes, as evidenced by the uniformity and consistency in the by-laws, rules and regulations within each private contractual order. However, where a national court precludes the application of the certain international rules and regulations in its country, global sports law becomes fragmented. If the rules of *lex sportiva* varied from country to country, a patchwork of legal regimes governing sport would result, thus disrupting the consistency in sporting rules that is naturally created by the regulatory hierarchy of sport. Indeed, the importance of preserving uniformity in global sports law was noted by a CAS panel when it refused to supplant FIFA regulations governing damages for breach of contract with Scottish law, writing “it is in the interests of football that solutions to compensation be based on uniform criteria rather than on provisions of national law that may vary from country to country.”⁴⁴¹

⁴³⁹ See *supra* note 412 and the accompanying quote.

⁴⁴⁰ Mitten, *supra* note 314 at 16.

⁴⁴¹ *Wigan Athletic FC v. Heart of Midlothian*, CAS 2007/A/1298, at para. 64.

In conclusion, where conflicts arise between global sports law and national law it may be difficult for national courts to intervene and remedy the conflict, for a number of legal and policy reasons. Thus, to some extent, it is appropriate to conceptualize global sports law as immune from national law. In many instances, this immunity may be entirely desirable. For example, sanctions for anti-doping rule violations that violate national laws governing restraint of trade have been upheld as necessary to effectively regulate doping in sport.⁴⁴² In contrast, this immunity becomes less defensible where, as the three case studies demonstrate, the rules of *lex sportiva* conflict with national laws that prohibit indirect discrimination on the basis of religion, gender or gender identity. In these instances, the relative immunity of *lex sportiva* from national law raises fundamental concerns about the adequate regulation of the international sport system. Specifically, in a self-validating legal system, are there sufficient mechanisms in place to ensure that the substance of *lex sportiva*, that is, the rules of international sport bodies, comply with basic principles of substantive equality and human rights? If not, what mechanisms exist, or can be developed, to frame the parameters of international sport bodies' regulatory discretion? It is these questions that will be the focus of the last part of this paper.

V. REGULATING GLOBAL SPORTS LAW

A. The Need to Look Beyond State-Based Regulation of Sport by National Courts

⁴⁴² See *Canas*, *supra* note 157 (CAS rejected the claim that doping sanction rules violated restraint of trade laws of Delaware and the European Union); *Eder v. Ski Austria*, CAS 2006/A/1102 & 1146 (CAS applies Austrian law to the dispute, but refuses to hold that it invalidates the WADA Code, and instead recognizes the need for global uniformity in the fight against doping).

The preceding section discussed the barriers that exist for national courts in regulating international sport. However, practically speaking, it will be a rare occurrence for a national court to have original jurisdiction over a dispute involving a challenge to the substance of a sport body's rules and regulations. As previously noted, each private contractual order of global sports law provides procedures for delocalized dispute resolution before internal and external arbitration bodies, including CAS. These procedures are enforced through compulsory and exclusive arbitration clauses found in the appeal policies of sport bodies and in formal athlete agreements. Athletes are thus precluded from bringing sport disputes to national courts until they have exhausted these administrative remedies.⁴⁴³ In the case of disputes at the national sport level, an athlete will only have recourse to a court following binding arbitration by a national sport-specific arbitral tribunal. However, because of the broadly worded privative clauses contained in the procedural rules of each arbitration tribunal, a court may only review an arbitral award on very narrow grounds. Consequently, an athlete seeking to challenge the substance of a national sport body's rules in court is unlikely to be successful.

At the international sport level, where the majority of disputes are appealed exclusively to CAS, an athlete is similarly constrained in challenging the rules of the IOC, an IF or WADA in a national court. For instance, an athlete may challenge a CAS decision that enforces the rules of an international sport body by bringing an application for judicial review before the Swiss Federal Tribunal ("SFT"). The SFT has the authority to vacate a CAS award that is incompatible with Swiss public policy. To date, however, the SFT has refused to overturn a CAS decision on this basis, and it has expressly rejected arguments that a CAS award is invalid merely because the rules of an international sport body, which have been enforced by CAS, conflict with Swiss

⁴⁴³ It should be noted that the dispute in *Nagra*, *supra* note 383, arose before the Canadian Sport Dispute Resolution Centre was established and likely before CABA had adopted exclusive arbitration clauses in its regulations.

law.⁴⁴⁴ According to the SFT, the Swiss public policy defence “must be understood as a universal rather than national concept, intended to penalize incompatibility with the fundamental legal or moral principles acknowledged in all civilized states.”⁴⁴⁵ For example, the SFT has held that the anti-doping rules do not violate Swiss public policy merely because “the norms prescribed by the regulations . . . might be incompatible with certain statutory or legal provisions.”⁴⁴⁶

An athlete’s attempt to challenge a CAS award that enforces the rules of an international sport body is also likely to be unsuccessful in his or her own national court. Under the New York Convention, CAS awards have been generally recognized and enforced in national courts.⁴⁴⁷ Further, courts have refused to set aside a CAS award on public policy grounds merely because it conflicts with its own national law.⁴⁴⁸

In summary, there are numerous barriers to relying on national law and sovereign courts to regulate international sport. This is true where a national court has original jurisdiction over a sport dispute (see Part Four), and where it has judicial review jurisdiction over national and foreign arbitral awards. For Foster, this illustrates the inherent danger in the notion of global sports law, namely, that it is a dangerous smokescreen used by international sport bodies to justify their continued self-regulation and opposition to the rule of law.⁴⁴⁹ However, what Foster fails to recognize is that there are other mechanisms available in international law and

⁴⁴⁴ Mitten, *supra* note 314 at 9.

⁴⁴⁵ N., J., Y., W. v. FINA, 5P.83/1999 (2d Civil Ct., 31 March, 1999) in Digest of CAS Awards II, 1998-2000 (M. Reeb ed., 2002) 775 at 779.

⁴⁴⁶ Gündel, *supra* note 272 at 575.

⁴⁴⁷ See *supra* note 314.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Foster, “Global Sports Law”, *supra* note 1 at 17.

within *lex sportiva* itself to ensure that the appropriate boundaries are set on the regulatory discretion of international sport bodies. Indeed, in an era of globalization it seems antiquated to rely on national legal systems to regulate social subsystems that operate on a transnational scale. The remaining part of this section examines these alternative mechanisms to regulate international sport.

B. International Law

As Cutler notes, globalization has been accompanied not only by the growth of nonstate power exercised by transnational entities, but also by a commensurate lack of efforts to regulate these entities.⁴⁵⁰ Accordingly, legal commentators have contemplated how transnational nonstate entities could be incorporated into the framework of international law to enhance their accountability and regulation. Two constructs are commonly cited for achieving this.⁴⁵¹ The first involves viewing nonstate entities as subjects of international law with associated rights and duties under international customary law. The second focuses on the creation of an international code of conduct to govern the practices of nonstate entities. The following subsections discuss and evaluate both of these legal constructions in the context of the international sport system.

1. International Legal Personality of International Sport Bodies

⁴⁵⁰ Cutler, *supra* note 18 at 200.

⁴⁵¹ See *Ibid.*; Nowrot, “NGOs”, *supra* note 22 at 614 .

In order to be recognized as a *de jure* subject of international law, an international sport body must have international legal personality. To date, no international sport body has been formally recognized as having an international legal personality.⁴⁵²

The doctrine of international legal personality requires an entity to: first, participate on the international plane by entering into relations with other international persons, such as nation states; and second, to have some form of community acceptance through the granting of rights or duties under international law.⁴⁵³ Arguably, the IOC, WADA and international sport federations satisfy these criteria.

Regarding the prerequisite of participation, the IOC enters into binding agreements with countries that apply and that are selected to host the Olympic Games and other sporting games held under the patronage of the IOC. Similarly, international sport federations enter into agreements with states that assist in the organization and staging of world championship tournaments and events. Finally, WADA maintains close relations with states as its organizational structure includes representatives from intergovernmental organizations, national governments and other public bodies.

With respect to the second requirement, Nowrot notes that “community acceptance” exists where a nonstate entity possesses rights and duties under international treaty regimes.⁴⁵⁴ As an example, she notes the consultative status given to non-governmental organizations under Article 71 of the

⁴⁵² In 1982, the IOC did seek global recognition of its international legal personality by the United Nations in a Draft Declaration. The purpose of the Declaration was to establish the rules of the Olympic Charter as international law within the United Nations Framework: Nafziger, J.A.R., “Nonaggressive Sanctions in the International Sports Arena” (1983) 15 Case W. Res. J. Int’l L. 329 at 339. However, in March 1983, the IOC withdrew its plans to submit a declaration to the United Nations General Assembly: Ettinger, D.J., “The Legal Status of the International Olympic Committee” (1992) 4 Pace Year Book of International Law 97 at 108.

⁴⁵³ Ettinger, *ibid*; Nowrot, “NGOs”, *supra* note 22 at 621; Foster, “Global Sports Law” *supra* note 1 at 13.

⁴⁵⁴ Nowrot, *ibid*. at 623.

United Nations Charter and the Resolutions of the United Nations Economic and Social Council. The IOC, WADA and international sport federations possess similar rights and duties in the context of the anti-doping movement. As previously noted, under the UNESCO Convention a Conference of Parties composed of representatives from States Parties and UNESCO was created to monitor the implementation and enforcement of the Convention.⁴⁵⁵ WADA is invited as an “advisory organization” to the Conference of Parties, and several international non-governmental organizations, such as the IOC and international sport federations may be invited as “observers”.⁴⁵⁶ Together, the advisory duties of WADA and the participatory rights of the IOC and other international sport federations support their legal personalities under international law.

Assuming that the IOC, WADA and international sport federations may be properly characterized as legal subjects, they would bear rights and responsibilities under customary human rights law. To avoid the obstacles that would arise in enforcing these obligations in national courts, CAS could act as an enforcer of international customary law. For example, CAS could, theoretically,⁴⁵⁷ set aside the rules of an international sport body where they conflict with customary or peremptory norms.⁴⁵⁸ Indeed, since customary law can be viewed as an expression of international public policy, CAS would be pressured to exercise such authority in order to avoid having its award being turned over by the SFT or a national court pursuant to the New York Convention.

⁴⁵⁵ See *supra* note 189.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ CAS Code, *supra* note 276 at Rule 58 provides that where parties fail to choose the law to govern a proceeding, a CAS panel is entitled to apply the rules of law that it deems appropriate.

⁴⁵⁸ Peremptory norms, or *jus cogens*, are a type of customary law that are accepted and recognized by the international legal community as norms “from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”: Vienna Convention on the Law of Treaties, 23 May 1969, Can. T.S. 1980 No. 37, UN Doc. A/Conf. 39/26, art. 53 [Vienna Convention].

However, the instances where the rules of the IOC or an international sport federation would violate customary law are rare. Today, international sport bodies will generally not have rules that are discriminatory on their face. What is more likely is that an international sport body would have a rule that indirectly discriminates against a particular group. For example, both *Nagra* and *Sagen* were examples of indirect discrimination. The rules challenged were neutral on their face but had the indirect effect of discriminating against a particular religious practice and women. While customary human rights law would certainly apply in cases of direct discrimination protects against indirect discrimination, it is somewhat unclear as to whether it protects against indirect discrimination.⁴⁵⁹ Thus, even if customary law had been found to apply to the rules of the IOC in *Sagen* and the AIBA in *Nagra*, it may not have provided the remedy sought by the athletes in those cases.

2. Universal Codes of Conduct

Another possible mechanism for regulating sport under international law would be to create a universal code of conduct that would be binding on the IOC, WADA and all international sport federations. The use of an international code of conduct in this capacity was already attempted with transnational corporations.⁴⁶⁰ In the context of international sport, a universal code of conduct has two main advantages over customary law. First, a universal code would more

⁴⁵⁹ To establish that a legal norm is a rule of customary international law, there must be “evidence that states have consistently and generally followed the rule and that they have acted in this manner because they were of the view that they were obliged to do so under international law . . .”: Heckman, Gerald, “The Role of International Human Rights Norms in Administrative Law” in Flood and Sossin (ed.) *Administrative Law in Context* (Toronto: Emond Montgomery Publications Ltd., 2008) 309 at 311.

⁴⁶⁰ From the 1970s to the early 1990s numerous ambitious, but ultimately unsuccessful, efforts were made by the United Nations to produce a draft code of conduct that would establish a regulatory framework for transnational corporations to ensure corporate accountability and social responsibility: Cutler, *supra* note 18 at 200. See also Baade, Hans, W. “The Legal Effect of Codes of Conduct for Multinational Enterprises, (1979) 22 German Year Book on International Law 11 at 17.

clearly articulate and delineate the rights and responsibilities of international sport bodies compared to customary law. Second, the application and enforcement of a code of conduct would not be contingent on establishing that an international sport body possessed a legal personality. Despite these advantages, it is unlikely that such a code of conduct will be developed for the international sport system. This is primarily because the Olympic Charter already represents a code of conduct for a substantial portion of the international sport system (the Olympic Movement). And, further, any attempt to create an overarching code of conduct for the entire international sport system, would likely be strongly opposed by the IOC, since it has full control over the contents of the Olympic Charter.

The Fundamental Principles of the Olympic Charter provide as follows:

4. The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play. The organisation, administration and management of sport must be controlled by independent sports organisations.
5. Any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement.
6. Belonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC [emphasis added].⁴⁶¹

Theoretically, such principles are broad enough to prohibit indirect discrimination and could be enforced by the IOC Executive Board, CAS and national sport arbitration tribunals. However, the fact that the AIBA continues to have a clean shaven rule and that the IOC's adopted a rule that was discriminatory in a substantive sense, suggest that these principles are not being

⁴⁶¹ Olympic Charter, *supra* note 92, see "Fundamental Principles".

adequately enforced.⁴⁶² Athletes seeking to challenge the rules of the IOC or an international sport federation (that belongs to the Olympic Movement) before CAS would be wise to rely on these fundamental principles to advance their claim, rather than their own national human rights law.

D. Supervisory Jurisdiction of Sport Arbitration Tribunals

A final mechanism of regulating international sport is through external arbitration by CAS and national sport arbitration tribunals. Although both arbitral bodies are part of *lex sportiva*'s self-legitimizing process, that does not mean that they exist to merely validate and enforce the norms unilaterally created by international sport bodies. As noted in Part Three of this paper, both CAS and the Canadian sport arbitration tribunal exercise a supervisory function over the rules of international and national sport bodies.⁴⁶³ However, this role is not confined to making recommendations regarding amendments to a sport body's rules. Instead, it permits arbitrators to directly interfere with the substance of a sport body's rules where they contravene core notions of justice and equity shared by the arbitrators.⁴⁶⁴ In such cases, arbitrators will set aside the sport body's rule and supplant it with its own normative preferences for how sport should be regulated in the context.⁴⁶⁵ This type of intervention represents a shift in a sport arbitrator's role as an

⁴⁶² Even though the IOC has refused to revisit its decision to include women's ski jumping in the Olympic Programme for the 2010 Games, the fact that it has since removed the rules governing the selection of Olympic sports from the Olympic Charter suggests that it may have recognized that it was in violation of these principles: see *supra* note 390.

⁴⁶³ See *supra* notes 363 and 365 and the accompanying discussion.

⁴⁶⁴ Erbsen, *supra* note 157 at 441; Findlay & Mazzucco, *supra* note 353.

⁴⁶⁵ *Ibid.*

enforcer of norms of global sports law to a *source* of norms that frame the parameters of a private sport body's regulatory authority.⁴⁶⁶

Despite having this intervening authority, both CAS and Canadian arbitrators exercise it infrequently.⁴⁶⁷ This is primarily because it is rare to encounter instances where the rules of a sport body contravene core notions of justice and equity. However, there may be two other reasons at play. The first concerns an uncertainty about what the proper institutional role of a sport arbitrator is within global sports law. Like *lex mercatoria*, a fundamental principle of *lex sportiva* is that the rules of a sport body, which are contractual in nature, should be *prima facie* enforced according to their terms (*pacta sunt servanda*). In other words, it is not the role of an arbitrator to amend or rewrite a rule or regulation that has been created by a sport body and accepted by an athlete. Thus, any intervention by an arbitrator into the substance of a sport body's rule violates this principle. However, according to Foster, sport arbitrators must be careful not to let this principle constrain their supervisory jurisdiction over sport. He notes the following in relation to CAS:

[i]f the approach of [CAS] is non-interventionist against international sport federations, then it appears only to be a private regulatory power. But [CAS] needs to be interventionist in all its functions. It can continue to act as the supreme court for the interpretation of *lex sportiva*. But its primary role must be to ensure individual justice and rights for athletes; this is what will reinforce its legitimacy and protect its own institutional autonomy and independence.⁴⁶⁸

⁴⁶⁶ *Ibid.*

⁴⁶⁷ For examples of where CAS has claimed the authority to set aside a sport body's rules, but has declined to do so because of it has re-interpreted the rule to comply with its normative preferences, see *T v. FIG*, CAS 2002/A/385; *Bray v. FINA*, CAS 2001/A/337; *Aanes v. FILA*, CAS 2001/A/317. For a similar example involving a Canadian arbitrator, see *Dufour-Lapointe v. Canadian Freestyle Ski Association*, SDRCC 07-0065, January 2008.

⁴⁶⁸ Foster, "Lex Sportiva" *supra* note 1 at 440.

The same reasoning could be applied to national sport arbitrators. In short, arbitrators need to be cognizant of their supervisory jurisdiction over sport and exercise this power to ensure that the appropriate safeguards are in place to protect the rights of athletes from the unfettered authority of sport bodies.

The second involves the reluctance of sport arbitrators to usurp the rule-making authority of private sport bodies. Although sport arbitrators are generally well-versed in sports law they may not possess the same level of expertise and technical knowledge of a sport that a sport body does. As a result, arbitrators may be hesitant to impose their own normative preferences for how sport should be regulated in a particular dispute. However, non-intervention on this basis would be overly cautious and too deferential to the authority of sport bodies. CAS arbitrators are selected for both their legal expertise and knowledge of the sport system. This should provide them with sufficient resources to create their own sport-specific equity norms. Further, as CAS's body of case law continues to develop it is likely that its normative preferences regarding the regulation of sport will become more clearly defined. This assembly of equity norms could, in turn, be relied upon by national sport arbitrators through the existing systems of precedent that operate within the hierarchy of arbitral tribunals.

In summary, sports arbitration has the potential to be the most suitable mechanism to regulate both international sport bodies and the development of global sports law. However, to achieve this status it is necessary that both international and national sport arbitrators recognize their overarching duty to supervise the regulatory authority of sport bodies. Further, it is essential that a universal approach to arbitral decision-making continue to develop, ideally, one that is based on the interventionist model currently practised by CAS and Canadian sport arbitrators.

CONCLUSION

The globalization of sport has shifted the legal regulation of the international sport system almost entirely outside the jurisdiction of national legal systems and into the private sphere of international and national sport bodies and sport-specific arbitral tribunals. This has allowed the international sport system to develop into a self-contained and self-reproducing system of private transnational law.

With this autonomy have come fears that the international sport system is not subject to adequate legal regulation. Arguably such fears are exaggerated since they assume that national legal systems are the only authorities capable of effectively regulating international sport bodies and the development of global sports law. However, in an era of globalization, it is inappropriate to rely on national legal orders to regulate social systems that are inherently transnational in their structure and operation. Instead, private centralized forms of legal regulation need to be considered, particularly those that already exist within the international sport system. For example, the Olympic Charter is used as a code of conduct to regulate members of the Olympic Movement. Over time, it could develop into a universal code, provided that international sport federations outside of the Olympic Movement are persuaded to adopt it. Most importantly, the intervening authority of sport arbitrators needs to continue to develop through a universal approach to arbitral decision-making and an efficient system of precedent.