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The living Lex Sportiva

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Abstract

This chapter focuses on the emergence of a transnational sports law, also known as lex sportiva, ruling international sports. In the transnational law literature, the lex sportiva is often referred to as a key example or case study, but rarely studied in practice. Yet, it constitutes an important playground for transnational legal research and practice, and this chapter aims to show why. The focus of the chapter will first be on the rules of the lex sportiva. Law, even in its transnational form, is still very much connected to written rules against which a specific behaviour or action is measured as legal or illegal. As will be shown, this is also true of the lex sportiva, which is structured around an ensemble of rules produced through a variety of law-making procedures located within different institutions. The second section of this chapter will aim to look beyond the lex sportiva in books to narrate the lex sportiva in action. It asks, what are the institutional mechanisms used to concretize the lex sportiva in a particular context? The aim will be to go beyond the rules in order to identify the processes and institutions making the lex sportiva in its daily practice. Finally, the enmeshment of the lex sportiva with state-based laws and institutions is highlighted. While the lex sportiva is often presented as an autonomous transnational legal construct detached from territorialized legal and political contexts, it is shown that in practice it operates in intimate connection with them. Hence, its transnational operation is much less characterized by full autonomy than assemblage.

Keywords

lex sportiva, transnational law, global law, sports law, court of arbitration for sports, international olympic committee, world anti-doping agency, fifa

TRANSNATIONAL SPORTS LAW: THE LIVING *LEX SPORTIVA*

Antoine Duval*

I. INTRODUCTION

This chapter focuses on the emergence of a transnational sports law, also known as *lex sportiva*, ruling international sports. As will be elaborated upon, the *lex sportiva* is conceived as a complex transnational legal regime enmeshing private Sports Governing Bodies (SGBs) member of the Olympic Movement (OM)[1] and their rules governing specific competitions (e.g. the Olympic games), specific sports (e.g. the rules of International Federations (IFs), or specific sporting issues (e.g. doping) with a variety of public institutions and their laws. In the transnational law literature, the *lex sportiva* is often referred to as a key example or case study, but rarely studied in practice.[2] Yet, it constitutes an important playground for transnational legal research and practice, and this chapter aims to show why.[3]

The chapter is primarily exposing the modes of operation of the *lex sportiva*. In the first section, the focus will be on the rules of the *lex sportiva*. Law, even in its transnational form, is still very much connected to written rules against which a specific behaviour or action is measured as legal or illegal. As will be shown here, this is also true of the *lex sportiva*, which is structured around an ensemble of rules produced through a variety of law-making procedures located within different institutions. The second section of this chapter will aim to look beyond the *lex sportiva* in books to narrate the *lex sportiva* in action. It asks, what are the institutional mechanisms used to concretize the *lex sportiva* in a particular context? The aim will be to go beyond the rules in order to uncover the processes and institutions making

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[1] In addition to the International Olympic Committee (IOC), the Olympic Movement includes the International Sports Federations (IFs), the National Olympic Committees (NOCs), the Organising Committees for the Olympic Games (OCOGs), all other recognized federations, institutions and organisations, as well athletes, judges/referees, coaches and other sports technicians. See "Factsheet: The Olympic Movement," *International Olympic Committee*, April 2015, online (https://stillmed.olympic.org/Documents/Reference_documents_Factsheets/The_Olympic_Movement.pdf).

[2] For rare exceptions, see Franck Latty, *La Lex Sportiva: Recherche sur le droit transnational* (Martinus Nijhoff Publishers, 2007) and Lorenzo Casini, *Il Diritto Globale dello Sport* (Giuffré, 2010).

[3] For some previous attempts, see Antoine Duval, "*Lex Sportiva*: A Playground for Transnational Law," *European Law Journal* 19, no. 6 (2013): 822-842 and Antoine Duval, "What lex sportiva tells you about transnational law," in *Jessup's Bold Proposal. Critical Engagements with Transnational Law*, ed. Peer Zumbansen (Cambridge University Press, forthcoming).

the *lex sportiva* in its daily practice. Finally, in its third section, the chapter aims to highlight the enmeshment of the *lex sportiva* with state-based laws and institutions. While the *lex sportiva* is often presented as an autonomous transnational legal construct detached from territorialized legal and political contexts, it is shown that in practice it operates in intimate connection with them. Hence, its transnational operation is much less characterized by full autonomy than assemblage.

II. THE TRANSNATIONAL RULES OF THE *LEX SPORTIVA*

The *lex sportiva* relies primarily on private rules recognized as valid by the various operators of the system. These rules are of different types. Some are applicable across the entire OM, such as the Olympic Charter (OC), which can be considered the overarching constitution of constitutions of the *lex sportiva*. This is true as well of the World Anti-Doping Code (WADC), the universal text applicable to the anti-doping fight inside the OM. Others, in fact the majority, are issued by the IFs and are restricted to a particular sport (e.g. the rules of the Fédération Internationale de Football Association (FIFA) and potentially even to a particular region (e.g. the rules of the Union of European Football Associations (UEFA).

1. The Constitution(s) of the lex sportiva

All the members of the OM commit to abiding by the OC,[4] which stands supreme as an overarching constitution of the *lex sportiva*.[5] The first OC was published in 1908, but it actually became known as the OC only in 1978.[6] The current OC includes the *Fundamental Principles of Olympism* as well as rules and by-rules. It defines the purpose of Olympism, the mission of the International Olympic Committee (IOC) and the rights and obligations of the members of the OM. In general, the structure of the *lex sportiva* is probably better understood as a federal construct in which the sub-levels dispose of a large autonomy and a multiplicity of sub-constitutions cohabit with the OC in a pluralistic environment.[7] The statutes of the IFs

[4] *Olympic Charter* (Lausanne: International Olympic Committee, 2017), Article 1[*OC*] (if not indicated otherwise references are made to the 2017 version of the OC) provides: "The Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the Olympic Charter."
[5] Antoine Duval, "The Olympic Charter: A transnational constitution without the state?", *Journal of Law & Society* 45, no. S1 (2018): S245-S269.
[6] Jean-Loup Chappelet and Brenda Kübler-Mabbott, *The International Olympic Committee and the Olympic System: The Governance of World Sport* (Abingdon, Oxon: Routledge, 2008), 22.
[7] Mathieu Maisonneuve, "Les ordres juridiques sportifs transnationaux," *Revue de la recherche juridique – Droit prospectif* (2005): 1563-1597, 1564.

include similar constitutional secondary rules defining the internal institutional structure and fundamental values of each of them. Nonetheless, the OC exercises a powerful centripetal force over them.[8] In particular, the values enshrined in the *Fundamental Principles of Olympism* have started to take a constitutional function at the CAS, where they are invoked to challenge decisions of the various members of the OM.[9] Finally, the OC enshrines the key principle of autonomy of sport, which the IOC relies on to claim its independence from governmental interferences and to reserve a space of functional sovereignty to the OM.[10]

2. A Global 'Criminal' Code for the Lex Sportiva: the World Anti-Doping Code

One of the core obligations imposed by the OC on the members of the OM is the adoption and implementation of the WADC.[11] This obligation, while resisted at first by some IFs (in particular FIFA),[12] is now universally accepted inside the OM.[13] The World Anti-Doping Agency (WADA), a Swiss foundation seated in Montréal (Canada), is financed by the OM and public authorities and jointly controlled by them. The agency was created under the impetus of the IOC as a response to the doping scandal affecting the Tour de France in 1998. Its main task is to produce a uniform WADC through a complex legislative process.[14] The first such Code entered into force in 2004 and was amended twice since then in 2009 and 2015. The current WADC comprises 25 articles regulating the various stages of the anti-doping process. In particular, it provides the overarching definition of doping as 'the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.10 of the Code'.[15] The WADC regulates the testing and disciplinary procedure to be followed in anti-doping cases. It also provides for a specific sanctioning regime to be applied

[8] For a similar view, see Latty, *La Lex Sportiva: Recherche sur le droit transnational*, *supra* note 2, 216-221.
[9] Duval, "The Olympic Charter: A transnational constitution without the state?", *supra* note 5.
[10] *OC*, *supra* note 4, Rule 2(5) provides that it is the IOC's role "to take action to strengthen the unity of the Olympic Movement, to protect its independence and to preserve the autonomy of sport."
[11] *OC*, *supra* note 4, Rule 43 provides that "[c]ompliance with the World Anti-Doping Code […] is mandatory for the whole Olympic Movement."
[12] See the Advisory Opinion CAS 2005/C/976 & 986, *FIFA & WADA* (2006). See also Ulrik Wagner, "Towards the Construction of the World Anti-Doping Agency: Analyzing the Approaches of FIFA and the IAAF to Doping in Sport," *European Sport Management Quarterly* 11, no.5 (2011): 445-470.
[13] For a full list of the signatories, see "Code Signatories," *World Anti-Doping Agency*, https://www.wada-ama.org/en/code-signatories#OlympicMovement.
[14] The upcoming "2021 Code Review Process" is explained at "2021 Code Review," *World Anti-Doping Agency*, https://www.wada-ama.org/en/what-we-do/the-code/2021-code-review.
[15] *World Anti-Doping Code* (Montreal: World Anti-Doping Agency, 2015), Article 1 [*WADC*].

in case of anti-doping violation.[16] Its implementation is supported by six international standards, and its transposition by the SGBs is eased through the use of model rules.[17] Hence, the world anti-doping fight is currently structured around a universal text, the WADC, produced by a private entity and incorporated by the IFs and NOCs into their own rules, while also informing national legislations. In practice, it is the main regulatory field in which the primary rules of the *lex sportiva* are (on paper at least) truly universal.[18]

3. The Many Primary Rules of the Lex Sportiva

The IFs play a fundamental regulatory function in sports, as they define the field of play (in a narrow and wide sense) of a specific sport. There is only one IF recognized for each sport by the IOC, which secures their monopoly in governing their sport. Each IF is incorporated under a specific national law, more often than not as a Swiss association (but there are exceptions, such as the International Association of Athletics Federation (IAAF) registered in Monaco).

In general, the IFs impose different types of primary rules onto their affiliates:

- The **rules of the game** define the way a particular sport is played. These constitute the material and institutional frame under which a specific game is played.[19] They are the first rules needed for a specific sport to take a stable existence beyond its fleeting unregulated practice.[20] The creation of national and international federations was thus originally necessary to ensure that identical rules of the game apply in order to

[16] On the sanctioning regime, see Antonio Rigozzi, Ulrich Haas, Emily Wisnosky and Marjolaine Viret, "Breaking down the process for determining a basic sanction under the 2015 World Anti-Doping Code," *The International Sports Law Journal* 15, no.1 (2015): 3-48.
[17] WADA has introduced six International Standards, see "International Standards," *World Anti-Doping Agency*, https://www.wada-ama.org/en/international-standards. It also provides Model Rules at "Model Rules, Guidelines and Protocols," *World Anti-Doping Agency*, https://www.wada-ama.org/en/model-rules-guidelines-and-protocols.
[18] The IOC is trying to impose a similar unified set of rules to avert the manipulation of competitions, see the *Olympic Movement Code on the Prevention of the Manipulation of Competitions*, IOC, online (https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Ethics/Good-Governance/olympic_movement_code_on_the_prevention_of_the_manipulation_of_competitions-2015-en.pdf#_ga=2.28784884.939200924.1522164510-1955242631.1476266185).
[19] They are sometimes referred to as the *lex ludica*, see Ken Foster, "*Lex Sportiva* and *Lex Ludica*: The Court of Arbitration for Sport's Jurisprudence," *The Entertainment and Sports Law Journal* 3, no.2 (2005): 1-14.
[20] It is interesting to note that the "rule of the games" have been repeatedly used by legal theoreticians and philosophers in their inquiries on the concept of law. See for example in François Ost and Michel van de Kerchove, "Le jeu : un paradigme fécond pour la théorie du droit ? ", *Droit et Société* 17, no.1 (1991):161-96.

literally construct a shared playing field on which a growing number of competitors could meet and practice a particular sport.

- The **rules regulating the bidding process for, and organization of, international competitions** provide the framework for the attribution and organization of a specific competition. On the one hand, they include rules and conditions dedicated to the bidding process, which are analogous to sector-specific transnational procurement rules.[21] They focus on the process and conditions leading to the attribution of a specific competition to a specific country or city. On the other hand, they cover the rules related to the conditions to be fulfilled after the awarding of the event.[22] They define the type of infrastructure (e.g. stadia, transport, accommodations) needed, the programme and structure of the competition, and also include tax exemptions, migration requirements, and environmental conditionality. Additionally, they are also often complemented with rules regulating the behaviour of participants during the competition.[23]

- The **rules regulating transnational economic activity** in a particular sport. Some sports, in particular football but not exclusively, give way to intense transnational economic exchanges.[24] Players (the workers) are active on an increasingly transnational labour market and clubs (the companies) are competing for success and sponsoring revenue transnationally. This situation has led to the intervention of some

[21] For the IOC, see Rule 33 OC (and bye-rules) as well as, *Candidature Questionnaire: Olympic Winter Games 2026*, IOC, online (https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Winter-Games/Games-2026-Winter-Olympic-Games/Candidature-Questionnaire-2026.pdf). For FIFA, see *FIFA Regulations for the selection of the venue for the final competition of the 2026 FIFA World Cup*, online (https://img.fifa.com/image/upload/stwvxqphxp3o96jxwqor.pdf).

[22] The IOC for example imposes a specific Host City Contract divided in two separate documents providing for general principles and detailed operational requirements to be respected by the host city. For the 2024 Olympic Games in Paris, the two legs of the Host City Contract can be found at International Olympic Committee, *Host City Contract: Principles*, IOC, 2017, online (http://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host-City-Contract-2024-Principles.pdf) and *Host City Contract: Operational Requirements*, IOC, December 2016, online (https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host-City-Contract-2024-Operational-Requirements.pdf).

[23] See for example the *Regulations 2018 FIFA World Cup Russia*, FIFA, online (https://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/Regulations/01/87/54/21/1875421_DOWNLOAD.pdf).

[24] "FIFA Global Transfer Market Report: a new dimension in transfer spending after USD 6.37 billion spent in 2017," *FIFA*, January 30 2018, http://www.fifa.com/governance/news/y=2018/m=1/news=fifa-global-transfer-market-report-a-new-dimension-in-transfer-spendin-2927376.html.

IFs to regulate the movement of players in order to allegedly protect the integrity of competitions and the competitive balance between the clubs. In doing so, they sometimes introduce a parallel **transnational labour law** regulating the way players can move from one employer to another between different countries.[25] More recently, certain federations (in particular UEFA) have also started to impose licensing requirements to clubs participating in their competitions.[26] These requirements define certain conditions (covering for example the debt, deficit and overdue payables of a particular club) under which a club can participate in a particular competition. Thus, they amount to a specific form of **transnational company law** imposed on the corporate actors involved in a specific sport.

- Finally, the SGBs impose **disciplinary, quasi-criminal, rules sanctioning specific off-field behaviour**. In this regard, the SGBs have devised rules tackling primarily (but not exclusively) three different kinds of behaviour. First, since sports became an important transnational business subject to corruption and other abuses of power in recent years, SGBs have introduced ethics rules applicable to their staffs and their members.[27] These ethics codes provide for numerous sanctions against individuals engaging in a range of reprehensible actions. Second, as discussed above, the members of the OM have transposed the WADC into their internal regulations and transformed it in a contractually binding text targeting mainly athletes (and their coaches).[28] Third, the growth in online betting has stirred up the interest of criminal

[25] The most active international transfer system is the one created and regulated by FIFA. See the FIFA Regulations on the Status and Transfer of Players (RSTP) at *Regulations on the Status and Transfer of Players*, (Switzerland: FIFA), online (http://resources.fifa.com/mm/document/affederation/administration/02/92/54/37/regulationsonthestatusandtransferofplayersdez2017webeng_neutral.pdf); On the way these rules operate see Jan Kleiner, *Der Spielervertrag im Berufsfussball* (Schriftenreihe Causa Sport, Schulthess Juristische Medien, 2013) and Frans de Weger, *The Jurisprudence of the FIFA Dispute Resolution Chamber* (Hague, Netherlands: T.M.C. Asser Press, Springer, 2016).

[26] See for example the *UEFA Club Licensing and Financial Fair Play Regulations* (Switzerland: UEFA, 2015), online(https://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/02/26/77/91/2267791_DOWNLOAD.pdf).

[27] See for example the IOC Code of Ethics, IOC, April 2018, online (https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Code-of-Ethics/2018/Code-of-Ethics-2018.pdf#_ga=2.251072196.330218927.1524234181-1955242631.1476266185) and *FIFA Code of Ethics 2012*, FIFA, 2012, online (http://resources.fifa.com/image/upload/-500282.pdf?cloudid=qyjyegahoannfhfumb1g).

[28] See for example the *IAAF Anti-Doping Rules*, IAAF, online (https://www.iaaf.org/download/download?filename=0d75481e-55ef-4c25-b154-da5a08bc9a26.pdf&urlslug=IAAF%20Anti-Doping%20Rules) and the *FIFA Anti-Doping Regulations*, *FIFA*, online (https://no-doping.fifa.com/fileadmin/user_upload/pdf/anti-doping_regulations_en.pdf).

networks in match fixing, and SGBs have attempted to tackle the issue by imposing sanctions on clubs, players and other officials taking part in such activities.[29] Thus, in parallel to existing criminal laws, a private form of transnational quasi-criminal law exclusively applicable to affiliates of SGBs has emerged.

These ideal-types cover most but not all of the rules introduced by SGBs and constitute a patchwork of primary rules illustrating the potential of *lex sportiva* to influence the behaviour of numerous actors in the sports sector. As will be seen below, these private rules interact and imbricate with national, European and international laws.

This section provided a general account of the rules that undergird the *lex sportiva*. But rules do not speak by themselves. Beyond the *lex sportiva* in the books, it is necessary to look at the *lex sportiva* in action.

III. THE TRANSNATIONAL OPERATORS OF THE *LEX SPORTIVA*

The *lex sportiva* is primarily concretized and operationalized by a network of specialised private administrative bodies: the SGBs. They are mostly in charge of giving a practical meaning to the rules discussed in the previous section, which would otherwise remain *lettre morte*. Furthermore, when a dispute arises on the application of the rules in a particular context, their enforcement is dealt with by the judicial institutions of the *lex sportiva*.

1. The Transnational Administrative Function of the SGBs

The SGBs are the main administrative masters of the *lex sportiva*. They confer to it its material strength and relevance through their daily bureaucratic work. In doing so, they flesh out the meaning of the rules and frame the life of those engaging into sports at the international (and often also at the national) level. They affect primarily athletes and clubs but also sponsors and supporters, as well as investors and citizens. A relatively small (but highly transnationalized) ecosystem of people, practices and institutions is predominantly moulded through these administrative decisions. In practice, each type of primary rules is

[29] See for example Art. 12 of the *UEFA Disciplinary Regulations*, *UEFA*, 2017, online (https://www.uefa.com/MultimediaFiles/Download/Regulations/uefaorg/UEFACompDisCases/02/48/23/06/2482306_DOWNLOAD.pdf).

subjected to a different administrative process in each of the SGB. Thus, the rules of the game are often enforced on the field of play by a specific administrative authority, the referee, who is empowered to do so by the national or international SGB of the sport in question. A disciplinary commission might also intervene to review *ex post* a field of play decision.[30]

Further, the rules regarding the organization of a competition are subjected to different administrative mechanisms depending on whether the organization is in its bidding phase or implementation phase. In the bidding phase, a specific body inside the SGBs is usually conducting an evaluation of the various bids received.[31] This evaluation is then submitted to the supreme body of the SGB in question (often the general assembly of the members) for it to decide on the attribution of the competition based on the elements gathered.[32] Nonetheless, as has been highlighted in various high-profile instances in recent years, this bidding process is rarely transparent and the deciding body can be free to disregard the transnational public procurement standards mentioned above.[33] Once a bid has been selected and a contract signed with the prospective bid city or country, another monitoring process is introduced to guarantee that the preparations follow the rules of the SGB.[34] This process is often supervised by a specific body reporting on a regular basis on the progress of the preparation.[35]

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[30] See for example Article 77 of *FIFA Disciplinary Code: 2017 Edition*, FIFA, 2017, online (https://img.fifa.com/image/upload/koyeb3cvhxnwy9yz4aa6.pdf).

[31] For example, the IOC has an evaluation commission tasked with reviewing the candidatures of the cities applying to host the Games, see "Evaluation Commission," *IOC*, https://www.olympic.org/evaluation-commission; For the 2026 World Cup, FIFA set up a Bid Evaluation Task Force, see "2026 Bid Evaluation," *FIFA*, April 6, 2018, http://www.fifa.com/about-fifa/news/y=2018/m=4/news=2026-bid-evaluation-task-force-to-visit-bidding-member-associations.html.

[32] *OC*, *supra* note 4, Rule 18(2)4 foresees that the IOC Session (the parliament of the IOC) is competent to elect the Host City of the Olympics. While, Article 69(1) of the *FIFA Statutes* (Zurich: FIFA, 2018) provides: "The Council shall decide the venue for the final competitions organised by FIFA, with the sole exception of the venue for the final competition of the FIFA World Cup™, which shall be decided by the Congress in accordance with par. 2 of this article."

[33] For a polemical take on the election of Qatar to host the 2022 FIFA World Cup, see Heidi Blake and Jonathan Calvert, *The Ugly Game: The Corruption of FIFA and the Qatari Plot to Buy the World Cup* (New York: Scribner, 2017). See also Bruce W. Bean, "An Interim Essay on FIFA's World Cup of Corruption: The Desperate Need for International Corporate Governance Standards at FIFA," *ILSA Journal International and Comparative Law* 22, no. 2(2016): 367-392.

[34] For the Olympic Games, the duties of the host cities are enshrined in the Host City Contract and the so-called Operational Requirements. For the 2024 Host City Contract, see *Host City Contract Principles*, IOC, online (https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host-City-Contract-2024-Principles.pdf).

[35] For the Olympic Games this monitoring is conducted by a specific IOC Coordination Commission set up for each Olympics. The currently existing Commissions are listed at "Coordination Commissions," *IOC*, https://www.olympic.org/coordination-commissions. FIFA competitions are supervised by the Organising Committee for FIFA competitions, for the current composition of the Committee see "Organising Committee for FIFA Competitions," *FIFA*, https://www.fifa.com/about-fifa/who-we-are/committees/committee/1946678/.

Depending on the stringency of the control exercised, the host city or country can be strongly encouraged to accelerate its works or to modify its plans. Yet, in practice, scholars have shown that the SGBs are sometimes reluctant or powerless to intervene in this phase of the preparation of an event. Human rights or environmental requirements for example are often disregarded.[36]

The transnational economic rules imposed by SGBs are also subjected to administrative controls usually linked with a player or a club's duty to request a license to play for a new club in another country or to enter a specific competition. In this circumstance, the SGBs can request additional information related to the employment status of the player or the financial situation of the club before granting this request. For example, a professional football player wanting to move from club A in country A to club B in country B will have to obtain an 'International Transfer Certificate'.[37] Without this certificate, she cannot be registered in a new federation and play for her new club. However, to obtain this ITC, the new club of the player will have to submit contractual documents into a computer system called the transfer matching system controlled by FIFA TMS Gmbh, a separate Swiss limited liability company owned by FIFA in order to assess whether the move complied with the FIFA RSTP.[38] If it finds that the transfer has not been orderly concluded, it can refer the club or the association to the FIFA Disciplinary Committee for sanctions.[39] Similarly, the UEFA Club Licensing and Financial Fair Play Regulations are enforced through UEFA's monopoly power over access to UEFA competitions in cooperation with the national federations.[40] In this context, clubs wishing to participate in UEFA competitions are forced to submit financial information and 'relevant documents' (such as sponsoring agreements) to a specific body: the UEFA Club Financial Control Body. Its investigatory chamber assesses whether the European clubs comply with the break-even requirement enshrined in the UEFA CL&FFP Regulations.[41] If they do not, they face potential sanctions ranging from fines to a ban from participating in

[36] See Arnout Geeraert and Ryan Gauthier, "Out-of-control Olympics: why the IOC is unable to ensure an environmentally sustainable Olympic Games," *Journal of Environmental Policy & Planning* 20, no.1 (2018): 16-30.
[37] See Article 9 of *FIFA Regulations on the Status and Transfer of Players* (Zurich: FIFA, 2018) [*FIFA RSTP*].
[38] On this administrative procedure, see Annexe 3 of the *FIFA RSTP*, *supra* note 37.
[39] For the potential sanctions, see Article 9 of Annexe 3 of the *FIFA RSTP*, *supra* note 37.
[40] *UEFA Club Licensing and Financial Fair Play Regulations, Edition 2018* (Switzerland: UEFA, 2018), online (https://www.uefa.com/MultimediaFiles/Download/Tech/uefaorg/General/02/56/20/15/2562015_DOWNLOAD.pdf) [*UEFA CL & FFP*].
[41] Ibid., Articles 58 to 64.

UEFA competitions.[42] As one can derive from these examples, some SGBs have devised sophisticated private administrative regimes to monitor the enforcement of their economic rules.

Finally, the disciplinary rules related to off-field behaviour are also subjected to complex administrative processes. The enforcement of the WADC is largely outside the hands of WADA, which has only a weak capacity to investigate the compliance of the signatories of the code.[43] The bulk of the enforcement of the WADC is done by international federations and national anti-doping agencies.[44] For example, the IAAF created the Athletics Integrity unit, which is in charge of testing international athletes and investigating alleged anti-doping violations.[45] Similar (more or less powerful) entities exist in many IFs and constitute administrative arms translating the WADC into practice. Likewise, as match-fixing is progressively identified as a serious threat to international sports, new anti-match-fixing units and processes have been introduced in some SGBs to monitor betting markets and investigate the athletes or clubs linked with suspicious activities.[46] For example, UEFA collaborated with a private monitoring company, Sportradar, to set-up in 2013 its UEFA betting fraud detection system.[47] Finally, ethics rules are also subjected to an internal enforcement often by so-called 'independent' committees in charge of investigating alleged violations.[48] While

[42] See *Procedural rules governing the UEFA Club Financial Control Body, Edition 2015* (Switzerland: UEFA, 2015), Article 29.
[43] WADA has limited human (98 employees) and financial (USD29, 724,841) resources, that do not enable it to conduct extensive investigations or testing programmes. See *WADA Annual Report 2017*, WADA, 2017, online (https://www.wada-ama.org/sites/default/files/resources/files/ar2017_web.pdf).
[44] WADA publishes statistics by testing authority, which provide a clear picture of the diversity of administrative bodies involved in enforcing the WADC. See *2017 Anti-Doping Testing Figures*, WADA, 2017, online (https://www.wada-ama.org/sites/default/files/resources/files/2017_anti-doping_testing_figures_en_0.pdf).
[45] In its first year of operation, the Athletics Integrity Unit collected 9,730 samples. See *Athletics Integrity Unit Infographic*, Athletics Integrity Unit, April 2018, online (https://www.athleticsintegrity.org/downloads/pdfs/knowledge-centre/en/AIU-infographic-All.pdf).
[46] In 2013, the IOC put in place the Olympic Movement Unit on the Prevention of the Manipulation of Competitions and the IOC Integrity Betting Intelligence System, which assesses the risks of competition manipulation connected to sports betting and aggregates, analyses and disseminates information connected to this challenge. See *Olympic Movement Unit on the Prevention of the Manipulation of Competitions*, IOC, online (https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Protecting-Clean-Athletes/Competition-manipulation/Protecting-clean-athletes-competition-manipulation.pdf#_ga=2.258744010.115942912.1558011128-1722855409.1521813457).
[47] On the UEFA Betting Fraud Detection System, see "Betting Fraud Detection System," *UEFA*, May 8, 2017, https://www.uefa.com/insideuefa/protecting-the-game/integrity/betting-fraud-detection-system/index.html.
[48] The IOC created the Ethics Commission after the Salt Lake City Corruption scandal in 1999. See "Guardian of the Ethical Principles," *IOC*, online (https://www.olympic.org/ethics-commission). FIFA has an Independent Ethics Committee divided in two separate chambers (the investigatory and the adjudicatory chamber). See "Independent Ethics Committee," *FIFA*, https://www.fifa.com/about-fifa/who-we-are/committees/committee/1882034/.

anti-doping units or economic regulators have usually received considerable means from the SGBs, the ethics bodies are often less powerful, and their investigatory powers and capacities are limited. Yet, they constitute the embryo of a corps of 'attorney generals' of the *lex sportiva*.

The living *lex sportiva* is the product of the combination between the written rules described in the first section of this chapter and the practices of the many administrative bodies tasked with their implementation. In turn, the decisions of these bodies are subjected to the review of a judicial system structured around a multitude of internal jurisdictions embedded in the SGBs, which are subjected to the (almost) final review of the Court of Arbitration for Sport.

2. The Transnational Judicial System of the Lex Sportiva

The judicial system of the *lex sportiva* is extremely pluralistic due to the federal and decentralized nature of the network of governing bodies involved. In first instance, each SGB relies on its own internal judicial bodies to decide a dispute based on their specific substantive and procedural rules. If appealed, a case will reach the CAS where it is decided based on the Code of sports-related arbitration (CAS Code).

a. The Pluralistic Picture of the Internal Tribunals of the SGBs

It is beyond the scope of this chapter to map all the internal judicial bodies of SGBs involved in adjudicating the *lex sportiva*. Each IF disposes of a plurality of bodies dealing with judicial matters depending on the subject nature of the dispute. Disciplinary proceedings opposing a SGB to a particular individual or club involve appeals against certain field of play decisions, anti-doping violations, violations of the ethics or economic rules. Depending on the SGB, they can be dealt with by a single disciplinary committee or by issue-specific bodies specialized in anti-doping matters, violations of economic rules, or of the ethics codes. These decisions are sometimes subjected to an internal appeal before reaching the CAS.

In the case of FIFA, the Statutes list three 'judicial bodies': the Disciplinary Committee; the Ethics Committee; and the Appeal Committee.[49] The Disciplinary Committee is competent to

[49] *FIFA Statutes*, *supra* note 32, Article 52.

issue the disciplinary sanctions provided in the FIFA Statutes and the FIFA Disciplinary Code.[50] The FIFA Ethics Committee is competent to issue disciplinary sanctions on the basis of the FIFA Code of Ethics.[51] Finally, the Appeal Committee is responsible to hear appeals against decisions rendered by both the Ethics Committee and the Disciplinary Committee.[52] In parallel, FIFA has also created specific judicial bodies (the Dispute Resolution Chamber and the Player Status Committee) to deal with economic disputes arising out of the implementation of the FIFA Regulations on the Status and Transfer of Players.[53]

In general, these internal judicial bodies are often lacking independence *vis-à-vis* the executive bodies of the SGBs. Nonetheless, they are not free to decide as they see fit as their decisions are usually reviewable by the so-called 'Supreme Court of World Sport': the CAS.

b. The CAS: The Rise of the 'Supreme Court of World Sport'

The CAS is a relatively recent institutional actor in the world of international sports. It started operating in 1984 under the patronage of the International Olympic Committee and rendered its first award in 1987.[54] After the *Bosman* ruling, it became rapidly a popular venue to circumvent the jurisdiction of national courts, and nowadays almost all major international sporting disputes fall under its competence.[55] Paradoxically, one of the few SGBs, which has not fully conferred jurisdiction to the CAS to review its internal decisions, is the one that created the CAS in the first place: the IOC. Indeed, the IOC foresees that its decisions are reviewable by CAS only in 'certain cases' without further precisions.[56]

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[50] Ibid., Article 53.
[51] Ibid., Article 54.
[52] Ibid., Article 55.
[53] Ibid., Article 46.
[54] On this first award, see Erika Hasler, "Back to the Future: The First CAS Arbitrators on CAS's First Award (TAS 86/1, HC X. C. LSHG) and Its Evolution Since Then," in *Yearbook of International Sports Arbitration 2016*, eds. Antoine Duval and Antonio Rigozzi (The Hague, Netherlands: T.M.C. Asser Press, Springer, 2018); For a short official history of the CAS, see "History of the CAS," *CAS*, http://www.tas-cas.org/en/general-information/history-of-the-cas.html; In general on the Court of Arbitration for Sport, see Antonio Rigozzi, *L'arbitrage international en matière de sport* (Helbing & Lichtenhahn, 2005) and Johan Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence: An Empirical Inquiry into Lex Sportiva* (The Hague, Netherlands: Asser Press, Springer, 2019).
[55] As Jack Anderson argued in 2000, it was very successful in taking sports out of the courts, see Jack Anderson, '"Taking Sports Out of The Courts": Alternative Dispute Resolution and the International Court of Arbitration for Sport,' *Journal of Legal Aspects of Sport* 10, no.2 (2000): 123-128. In 2016, the CAS handled 599 cases, while in 1995, the year of the *Bosman* ruling, only 13 cases were submitted. The official CAS statistics are available at *Statistiques / Statistics*, CAS, online (http://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2016_.pdf).
[56] *Olympic Charter* (Lausanne: International Olympic Committee, 2018), Article 61(1).

CAS arbitration, at least in appeal cases, is essentially forced arbitration.[57] In other words, if one wants to take part in international sports competitions (or host an international sports competition) one has to accept a binding CAS arbitration clause. It could be argued that an athlete is still free to decide whether to engage in international sports at all, but that would nevertheless point at a limited free will in accepting the CAS arbitration clause. This clause is usually imposed either through a mechanism of contractual reference, the CAS clause is enshrined in the status to which a license will refer, or directly included in the entry form giving access to a specific competition. The Swiss Federal Tribunal (SFT) and more recently the German Bundesgerichtshof (BGH) have both recognized the validity of CAS arbitration clauses while acknowledging the limited freedom of athletes in consenting to them.[58] In October 2018, the European Court of Human Rights has unambiguously stated in a recent decision that a German speed-skater - Claudia Pechstein - was forced to undergo an arbitration at the CAS in the framework of an appeal against an anti-doping sanction issued by the International Skating Union.[59]

The CAS is directly incorporated in the transnational system or regime of the *lex sportiva* when it acts on appeal (primarily through the so-called CAS appeal procedure) of a decision rendered by the internal judicial bodies of SGBs. The appeal decisions constitute the majority of the CAS caseload.[60] Under the CAS appeal procedure, the CAS Panel decides the appeal cases *de novo*, meaning that it has full power to review both the facts and the law, and is not bound by the findings of the internal judicial bodies whose decision has been challenged.[61] In doing so, the CAS exercises a considerable influence on the practice of the internal administrative and judicial bodies of the SGBs. Its awards interpreting specific rules cannot

[57] This has been recently recognized by the European Court of Human Rights in its decision *Mutu and Pechstein v Switzerland*, Nos 40575/10 and 67474/10, [2018] ECHR 324; On the post-consensual foundations of the CAS, see Antoine Duval, "Not in My Name! Claudia Pechstein and the Post-Consensual Foundations of the Court of Arbitration for Sport," Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper, 2017-01 (2017), online (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920555).
[58] The SFT famously recognized in its Cañas judgment (ATF 133 III 235 c. 4.3.2.3 p. 245) that athletes are not freely consenting to CAS arbitration but upheld nonetheless the validity of the clause; See Antonio Rigozzi and Fabrice Robert-Tissot, "La pertinence du « consentement » dans l'arbitrage du Tribunal Arbitral du Sport," *Jusletter*, 2012, online (https://lk-k.com/wp-content/uploads/RIGOZZI-ROBERT-TISSOT-Pertinence-consentement-dans-arbitrage-TAS-Jusletter-2012.pdf); The BGH concluded that the consent was 'fremdbestimmt' (directed by someone else), see Bundesgerichtshof [BGH] [Federal High Court], 7 June 2016, *Pechstein v International Skating Union*, Az. KZR 6/15 (Germany).
[59] *Mutu and Pechstein v Switzerland*, *supra* note 57 at paras 109-115.
[60] 458 appeal cases were initiated in 2016 out of a total of 599 procedures. See *Statistiques / Statistics*, *supra* note 55.
[61] *Code of Sports-related Arbitration* (Court of Arbitration for Sport, 2019), Article R57.

be ignored by the SGBs concerned, as they would risk being sanctioned by CAS anew, which could be costly in both financial and reputational terms. Moreover, its reliance on a relatively stable jurisprudence and its almost systematic references to previous decisions when ruling on new cases, are important features contributing to the stabilization of normative expectations around the *lex sportiva*.[62]

Nonetheless, the CAS is closely connected to the SGBs and its independence from them is hardly evident.[63] This proximity is reflected in the nomination process to the International Council for Arbitration in Sport (ICAS) and ultimately its composition.[64] The ICAS has considerable power as the management body of CAS, especially as it designates the holders of key positions at the CAS (e.g. the Secretary General and the President of the Appeal Division) and selects the arbitrators included on the closed CAS list of arbitrators. Moreover, the CAS Appeal Division is through its president also connected to the SGBs.[65] The President of the Appeal Division plays a crucial role in the appeal process, as she has a decisive influence on the nomination of the presidents of the appeal panels (or the sole arbitrators).[66] Hence, she is in a position of tilting the direction taken by the CAS jurisprudence in a particular case. While the CAS has been deemed sufficiently independent by the SFT, the BGH and the ECtHR,[67] it seems not unreasonable to believe that its independence would nonetheless deserve to be reinforced.[68]

[62] The CAS panels are not abiding by the principle of stare decisis, but in practice they are prone to follow the interpretation of previous panels. This has led some to consider that CAS is coming close to adopting a doctrine of precedent, see Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse ?", *Arbitration International* 23, no.4 (2007): 357-378.
[63] As eloquently argued by the two dissenting judges of the ECtHR in their dissenting opinion to *Mutu and Pechstein v Switzerland*, *supra* note 57 at paras 5-17.
[64] The current ICAS president is John Coates, a current member of the IOC and its former Senior Vice President.
[65] Corinne Schmidhauser, the current president of the Appeal Division, is also the president of Antidoping Switzerland.
[66] *Code of Sports-related Arbitration*, *supra* note 61, Article R54.
[67] The SFT recognized this independence in *Lazutina*, 27 May 2003, 129 III 45 (Switzerland). The BGH in its *Pechstein v International Skating Union* decision shared the SFT's view that the CAS is sufficiently independent, see *Pechstein v International Skating Union*, *supra* note 58 at II.1.b.
[68] Many proposals have been made, see for example Remus Muresan and Niklas Korff, "Sportschiedsgerichtsbarkeit : wie weiter nach dem «Pechstein-Urteil» des Landgerichts München?", *Causa Sport* 3 (2014): 199-211 or Antoine Duval, "Three pillars for a reform of the Court of Arbitration for Sport: Independence, Transparency and Access to Justice," *Play The Game*, December 4 2015, https://www.playthegame.org/news/comments/2015/019_three-pillars-for-a-reform-of-the-court-of-arbitration-for-sport-independence-transparency-and-access-to-justice/.

This assemblage of rules, administrative and judicial practices is what *in fine* makes much of the *lex sportiva* constituting international sports as we experience it. Until now, the focus of this chapter was on the SGBs, and one could be excused for thinking that the *lex sportiva* constitutes a separate private regime radically autonomous from states. The last section of this chapter shows through three concrete case studies that in fact the *lex sportiva* is deeply intertwined with national and European laws and public institutions.

VI. *LEX SPORTIVA*: TRANSNATIONAL LAW WITH MANY STATES

In this section, I will use three examples related to the concrete operation of the CAS, the world anti-doping system, and the FIFA transfer system to illustrate the often-overlooked role played by national (and European Union) law and public institutions in the *lex sportiva*.

1. The CAS as Transnational Legal Alchemist

As we have seen the CAS is central in the operation of the *lex sportiva*. It is formally a private arbitral tribunal seated in Lausanne and subjected to the Swiss Private International Law Act (PILA). Under Article 187 PILA, an arbitral tribunal 'shall decide the dispute according to the rules of law chosen by the parties'. Accordingly, the current version of Article 58 of the CAS Code, defining the applicable law in appeal proceedings, provides that a CAS panel:

> 'shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate.'

This provision, while emphasizing that the CAS decides appeal cases primarily on the basis of the applicable regulations of the SGBs (discussed in the first section of this chapter), leaves open the possibility to apply the law of the country in which the respective SGB is domiciled and the rules of law considered appropriate by the Panel. Hence, the reliance on legal rules external to those produced by the SGBs is not excluded. In particular, Swiss law is called to play a central role due to the fact that SGBs are often based in Switzerland and that CAS awards are only appealable, on extremely narrow grounds, to the Swiss Federal

Tribunal (SFT).[69] Swiss law is specifically important for the interpretation of the SGBs' rules. The primary rules of the *lex sportiva* are no less open-ended than those of national states. Hence, there is often the need to determine the meaning of a specific rule in a particular context. In these situations, CAS panels regularly rely on interpretative techniques of Swiss law.[70] It is, therefore, unsurprising to see Swiss lawyers overrepresented at the CAS, be it as arbitrators or legal counsels.[71]

Moreover, the CAS also applies, though much more rarely, EU law.[72] Indeed, CAS panels have recognized that 'even if the parties had not validly agreed on its [EU law] applicability to this case, it should be taken into account anyway'.[73] This is because 'an arbitration tribunal sitting in Switzerland must take into consideration also foreign mandatory rules, even of a law different from the one determined through the choice-of-law process, provided that three conditions are met:

(a) such rules must belong to that special category of norms which need to be applied irrespective of the law applicable to the merits of the case (so-called lois d'application immédiate);

(b) there must be a close connection between the subject matter of the dispute and the territory where the mandatory rules are in force;

(c) from the point of view of Swiss legal theory and practice, the mandatory rules must aim to protect legitimate interests and crucial values and their application must allow an appropriate decision.'[74]

[69] On the centrality of Swiss law in CAS arbitration see Antonio Rigozzi, "L'importance du droit suisse de l'arbitrage dans la résolution des litiges sportifs internationaux," *Revue de droit Suisse* 132, no.3 (2013): 301-325; See also Despina Mavromati, "Applicability of Swiss law in Doping cases before the CAS and the Swiss Federal Tribunal," in *Yearbook of International Sports Arbitration 2016*, eds. Antoine Duval and Antonio Rigozzi (The Hague, Netherlands: T.M.C. Asser Press, Springer, 2018).

[70] For a good example of the central role of Swiss law in the interpretation of the rules of the SGBs by the CAS, see CAS 2013/A/3365, *Juventus Football Club S.p.A. v Chelsea Football Club Ltd* and CAS 2013/A/3366, *A.S. Livorno Calcio v Chelsea Football Club Ltd* (2015), at paras 137-144.

[71] Lindholm has evidenced empirically the massive gap between the number of Swiss arbitrators and the rest of the world, see Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence: An Empirical Inquiry into Lex Sportiva*, *supra* note 54.

[72] In general, see Antoine Duval, "The Court of Arbitration for Sport and EU Law: Chronicle of an Encounter," *Maastricht Journal of European and Comparative Law* 22, no.2 (2015): 224-255. For recent cases, see CAS 2014/A/3944, *Galatasaray Sportif Sinai A.S. v UEFA* (2015) and TAS 2016/A/4490, *RFC Seraing v Fédération Internationale de Football Association (FIFA)* (2017).

[73] CAS 98/200, *AEK Athens and SK Slavia Prague v UEFA* (1999), at para 10.

[74] Ibid.

By blending the private rules of the SGBs with considerations of national and EU law the CAS reduces the risk of involvement of the national courts or the European Commission (in particular over anti-trust matters). This does not mean, however, that the CAS applies national or European law as a national court or the Court of Justice of the European Union would do.[75] It solely indicates that arguments based on rules produced outside of the OM are an integral part of the operation of the *lex sportiva* at the CAS. This peculiar form of legal alchemy is turning the administrative and judicial decisions of the SGBs into legal gold: awards susceptible of recognition around the world and likely to be deemed legitimate in the eyes of national courts. This effect is buttressed by the SFT, which by providing an avenue for review of CAS awards, while in practice limiting drastically the chances of success, is giving its highly valued stamp of approval to the awards in question.[76]

Hence, the CAS weaves the private rules and practices of the SGBs and state-based laws. It regularly fuses them in order to limit, through their integration in its judicial reasoning, the potential resistance to its decisions. In the end, this leads to an ironical situation in which by integrating EU law or Swiss law into its awards the CAS augments the level of autonomy of the transnational regime.

2. The Public-Private Glocal Structure of the World Anti-Doping Regime

As discussed above, the WADC constitutes the only universally recognized set of primary rules applicable across all the SGBs involved in the OM. The WADC is the product of a unique public-private legislative process governed by a private foundation, WADA, which is under the shared control of states and SGBs.[77] Moreover, its enforcement relies on the actions of a plurality of anti-doping institutions at various levels.[78] This hybrid regime is supported by the *International Convention against Doping in Sport* (UNESCO Convention) signed at the General Conference of the United Nations Educational, Scientific and Cultural Organization in 2005, which provides that 'States Parties commit themselves to the principles

[75] Discussing some strange interpretations of EU law by the CAS, see Duval, "The Court of Arbitration for Sport and EU Law: Chronicle of an Encounter," *supra* note 72.
[76] On the limited scope of the SFT's review of CAS award, see Antonio Rigozzi, "Challenging Awards of the Court of Arbitration for Sport," *Journal of International Dispute Settlement* 1, no.1 (2010): 217-265.
[77] Lorenzo Casini, "Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)," *International Organisations Law Review* 6, no.2 (2009): 421-446.
[78] The "Roles and Responsibilities" of the various signatories of the WADC are recorded in *WADC*, *supra* note 15, Article 20.

of the Code as the basis for the measures provided for in Article 5 of this Convention'.[79] It is the most successful convention in the history of UNESCO in terms of the rhythm of ratification after adoption and the second most ratified of all UNESCO treaties.[80] This impressive ratification rate is mainly the result of the intense pressure exercised on states by the OM to ratify the UNESCO Convention. Indeed, the WADC provides in Article 22.8 that failure by a government 'to ratify, accept, approve or accede to the *UNESCO Convention*, or to comply with the *UNESCO Convention* thereafter may result in ineligibility to bid for *Events* […] and may result in additional consequences'. In short, the states have been integrated, via private and public law instruments, into the legislative and administrative processes at the heart of the world anti-doping regime, which must be characterized as a complex multilevel enmeshment of public-private regulations and institutions.[81]

Consequently, in principle, all international athletes engaged in the sporting competitions of the OM are subjected to the same obligations enshrined in the WADC and fall under a common world anti-doping regime aimed at 'de-fragmenting' [82] the fight against doping. Yet, the universal text is merely hiding the radical diversity of implementing contexts, as the recent Russian doping scandal has dramatically illustrated.[83] In reality, the concrete effects of the WADC fluctuate depending on each regulatory level's enforcement capabilities and political commitment to implementing the WADC.[84] Moreover, national anti-doping

[79] *International Convention against Doping in Sport*, 19 October 2005, 2419 UNTS 201 at Article 4 (entered into force 1 February 2007). Article 5 provides: "In abiding by the obligations contained in this Convention, each State Party undertakes to adopt appropriate measures. Such measures may include legislation, regulation, policies or administrative practices."

[80] At the time of writing, the Convention had been ratified by 188 states. For more information on the Convention, see "International Convention against doping in Sport, *UNESCO*, http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/.

[81] On this hybridity see Casini, "Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)," *supra* note 77; Jean-Loup Chappelet and Nicolien van Luijk, "The Institutional Governance of Global Hybrid Bodies: The Case of the World Anti-Doping Agency," in *Hybridity in the Governance and Delivery of Public Services (Studies in Public and Non-Profit Governance, Volume 7)*, eds. Andrea Bonomi Savignon, et al. (Bingley, UK: Emerald Publishing Limited, 2018); Cedric Jenart, "The Binding Nature and Enforceability of Hybrid Global Administrative Bodies' Norms Within the National Legal Order: The Case Study of WADA," *European Public Law* 24, no.3 (2018): 411-432.

[82] Franck Latty, "Les Règles applicables aux relations sportives transnationales, Le regard de l'internationaliste publiciste, " in *La Fragmentation du droit applicable aux relations internationales, Regards croisés d'internationalistes privatistes et publicistes*, eds. Jean-Sylvestre Bergé et al. (Pedone, 2011).

[83] On the doping scandal and its consequences see Antoine Duval, 'Tackling Doping Seriously - Reforming the World Anti-Doping System after the Russian Scandal," ASSER Policy Brief, No. 2016-02 (2016), online (https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2836388).

[84] A variability also highlighted by social scientists, see Dag Vidar Hanstad, Eivind Skille and Sigmund Loland, "Harmonization of anti-doping work: myth or reality?", *Sport in Society: Cultures, Commerce, Media, Politics* 13, no. 3 (2010): 418-430 and Bastien Soule and Ludovic Lestrelin "The Puerto Affair: Revealing the Difficulties of the Fight Against Doping," *Journal of Sport and Social Issues* 35, no.2 (2011): 186-208.

agencies and anti-doping laboratories, which conduct the brunt of the testing, are often controlled by states.[85] Even if they do not positively aim at favouring their national champions, states are not born equal and so are not their anti-doping operations. Similarly, the issuance of sanctions is highly decentralized (on a geographical and sport-by-sport basis), even though WADA disposes of the right (but not the material ability) to appeal any anti-doping decision involving an international athlete to the CAS.[86] Hence, despite the symbolic textual unity embodied in the WADC, the world anti-doping regime is in practice still differentiated on national fault-lines and captive of an inescapable transnational legal pluralism. This illustrates how scratching under the polish of a universal text, one observes the complexity and pluralism of transnational law in action. The world anti-doping regime is public-private in origin, but also glocal rather than global in practice, in so far as the global text is interpreted and concretized at local levels by various actors and institutions. Does this mean that states remain sovereign over their anti-doping policy? The Russian doping scandal has shown that while the world anti-doping regime cannot impose the same conditions to athletes worldwide, it can intervene and chastise states when they stray too far away from its core principles.[87] Local institutions shape the day-to-day practical meaning of the WADC, but transnational institutions can combat what they believe are pathologic implementations of the Code. The unsettled and uncertain *jeu* of transnational law is played in this space of tension between global and local.

Even in the presence of a seemingly universal code, the *lex sportiva* cannot be reduced to it. Instead, it must be studied in action, and its complex assemblage of practices and institutions comprehensively mapped and understood.

[85] On the Russian laboratory's close contacts with the Russian government, read the detailed confession of the former head of the laboratory to the New York Times in Rebecca Ruiz and Michael Schwirtzer, "Russian Insider Says State-Run Doping Fueled Olympic Gold," *New York Times*, May 12, 2016, https://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html?_r=0.
[86] *WADC*, *supra* note 15, Article 13.2.1.
[87] On the CAS's reaction to the scandal, see Antoine Duval, "The Russian doping scandal at the court of arbitration for sport: lessons for the world anti-doping system," *The International Sports Law Journal* 16, no.3-4 (2017): 177-197.

3. The Making of the FIFA Regulations on the Statute and Transfer of Players in the Shadow of Bosman

The complexity and hybridity of the *lex sportiva* can be further illustrated by retracing the genealogy of the FIFA RSTP and evidencing its enmeshment with EU law. More precisely, the current text of the FIFA RSTP results from a transnational law-making process in the shadow of a competition law investigation before the European Commission. In 1995, the *Bosman*[88] ruling of the European Court of Justice not only recognized the right of players not to be discriminated against in European football, but it also challenged the then applicable transfer regulations imposed by UEFA.[89] The Court concluded:

> 'that Article 48 of the Treaty [now Article 45 TFEU] precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.'[90]

In the aftermath of the ruling, the European Commission opened a competition law investigation against the 1997 FIFA RSTP. In the early 2000s, political negotiations took place between the EU Commission, FIFA, UEFA and FIFPro, the football players' union in the shadow of this investigation.[91] The basic principles which underlie the structure and operation of the current version of the RSTP were agreed with the European Commission in March 2001 under considerable political pressure.[92] Thus, despite the fact that the FIFA transfer system seems to create an autonomous transnational labour law, its present form is in fact the direct result of the intervention of the EU institutions. Interestingly, the CAS, which is competent to deal on appeal with the disputes involving the application by FIFA's judicial bodies of the RSTP, referred to this legislative history and the influence of EU law in order to

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[88] *Union royale belge des sociétés de football association, Royal club liégeois and Union des associations européennes de football (UEFA) v Jean-Marc Bosman,* C-415/93, [1995] ECLI:EU:C:1995:463 [*Bosman*].
[89] Antoine Duval, "The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of Bosman," in *The Legacy of Bosman,* eds. Antoine Duval and Ben Van Rompuy (Hague, Netherlands: T.M.C. Asser Press, 2016).
[90] *Bosman, supra* note 88 at para 114.
[91] For a review of these negotiations, see Borja Garcia, "The 2001 informal agreement on the international transfer system," *European Sports Law and Policy Bulletin*, no. 1 (2011): 17-29.
[92] The main principles of the agreement are enshrined in the EU Commission's press release announcing the closing of the investigation. See "Commission closes investigations into FIFA regulations on international football transfers," *European Commission*, June 5 2002, http://europa.eu/rapid/press-release_IP-02-824_en.htm.

interpret the RSTP.[93] Whether the agreement and its implementation by FIFA are compatible with EU law,[94] is irrelevant here. What matters is that transnational law-making processes of the *lex sportiva* are also affected by hybridity and enmeshment. However, this should not be over-interpreted as evidencing an imperial power-grab of the European Union over the *lex sportiva* (or the *lex FIFA*[95]). Instead, we are witnessing a complex interaction in which the EU can sometimes exercise an ephemeral power inside the *lex sportiva* and even become its co-legislator. Furthermore, while it had a clear influence in the drafting of the FIFA RSTP, the Commission does not control its enforcement. The text of the rules matters, but the institutional framework of their operationalization is at least as relevant to determine their practical meaning.

When studying the *lex sportiva* it is easy to fall prey to the romantic idea of a global community of sportspeople producing transnational law outside of the reach of the states and their laws. It is indeed a sector primarily ruled by private associations and subjected to the almost exclusive jurisdiction of an arbitral tribunal. Nonetheless, as this section has shown, this would ignore certain key features of the *lex sportiva* such as the integration of national and European law at the CAS, its dependence on national institutions in the framework of the world anti-doping regime, and the coproduction with the EU of some of its rules in the shadow of EU competition law investigations.

V. CONCLUSION

Studying the *lex sportiva* can be a ludic and fruitful way to deal with a serious topic: the transnationalization of law. This very particular case study of transnational law is characterized by two specific features: the prominence of private actors in the production and

[93] See most prominently in CAS 2013/A/3365, *Juventus FC v Chelsea FC* and CAS 2013/A/3366, *A.S. Livorno Calcio S.p.A. v Chelsea FC* (2015). On this case, see the commentary in Antoine Duval, "CAS 2013/A/3365 Juventus FC v. Chelsea FC and CAS 2013/A/3366 A.S. Livorno Calcio S.p.A. v. Chelsea FC, Award of 21 January 2015," in *Yearbook of International Sports Arbitration 2016*, eds. Antoine Duval and Antonio Rigozzi (The Hague, Netherlands: T.M.C. Asser Press, Springer, 2018).
[94] Doubting that the current RSTP is compatible with EU law, see Richard Parrish, "Article 17 of the Fifa Regulations on the Status and Transfer of Players: Compatibility with EU Law," *Maastricht Journal of European and Comparative Law* 22, no.2 (2015): 256-282 and Geoff Pearson, "Sporting Justifications under EU Free Movement and Competition Law: The Case of the Football 'Transfer System," *European Law Journal* 21, no.2 (2015): 220-238.
[95] Franck Latty, "La *lex fifa*," in *Droit et Coupe du Monde*, ed. Mathieu Maisonneuve (Economica, 2011).

enforcement of its rules and the relative stability and hierarchy of its institutional structure. Thus, as many authors have pointed out, it constitutes a tempting example to evidence the emergence of autonomous transnational legal systems embedded in transnational communities or connected to functional systems.[96]

And yet, the third part of this chapter evidences that the *lex sportiva* is far from autonomous or disconnected from state laws and institutions. The *lex sportiva* integrates (or appropriates) national and EU law via the decisional practice of the CAS in order to reinforce the acceptability of its decisions. It harnesses the institutional resources of national states to support the effectiveness of the WADC. Finally, some of its regulations, such as the FIFA RSTP, formally adopted by the SGBs, are in reality co-produced under the active supervision of the European Commission. In short, the transnational life of the *lex sportiva* does not occur outside of national or EU laws; it is in embedded in them. Yet, and this is a crucial point, this should not be mistakenly interpreted as pointing at a univocal hierarchical superiority of the state over the SGBs. Instead, we observe a complex and unstable regime in which ephemeral hierarchies appear and disappear depending on a variety of contingent factors and contexts.

Finally, in this chapter I have omitted an important issue: the legitimacy of transnational sports law. Why should individuals affected by the *lex sportiva* respect it? In practice they often do, but the main governing processes underlying the *lex sportiva* are far from representative of, or even just accountable to, the people most affected by their legislative and administrative activities.[97] Instead, their legitimacy can only stem from their output. In fact, the main reason or justification put forward by national courts to justify condoning these rules and decisions, is that without them there would be no level playing field necessary to hold international sporting competitions.[98] In this view, the end justifies the means. It is probably right that without rules constituting transnational playgrounds we would be deprived of the FIFA World Cup or the Olympic Games. Yet, can the end justify all means?

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[96] On this purist approach to the *lex sportiva*, see Duval, "What lex sportiva tells you about transnational law," *supra* note 3.

[97] For example, on the lack of democratic legitimacy of FIFA, see Lloyd Freeburn, "The fiction of democracy in FIFA's governance of football and the case of Football Federation Australia," *The International Sports Law Journal* (2019): 1-21.

[98] The BGH held in its *Pechstein v Switzerland* judgment that: "Sports federations such as the Second Defendant promote sports in general and particularly their own sport by creating the prerequisites for organized sport. To achieve the relevant goals, it is of fundamental importance to ensure that the rules apply to all athletes and are implemented everywhere in accordance with uniform standards (*Pechstein v Switzerland*, *supra* note 57 at para II.3.c)bb)2).

Shouldn’t there be some type of democratic control over the choice of those means? If yes, how should this control be organized without threatening the end? These are the challenges facing transnational sports law but also more broadly transnational law. We are at a moment in history in which transnational playgrounds are being constituted through transnational law because we need them to play, to commerce, or simply to communicate across borders. This state of necessity should not blind us to the challenge posed by the legitimation of transnational law. These playgrounds are not Pareto efficient constructions but distributive regimes, which are allocating costs and revenue and affecting the livelihoods of many. The need for transnational counter-powers to democratize transnational (sports) law is as pressing as ever.

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