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Quintessential Regulatory Capitalism

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INTERNATIONAL SPORTS TRANSNATIONAL LEGAL AND REGULATORY ORDER: QUINTESSENTIAL REGULATORY CAPITALISM

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Sports transnational legal and regulatory order is an excellent example of regulatory capitalism on a global scale – a hybrid regulatory system of great sophistication: part private, part public; both national and international; and comprising innovative legal and regulatory mechanisms to bring order to what is a complex and contested regulatory space. Yet, to date, there have been comparatively few attempts to apply regulatory scholarship’s understandings of regulatory capitalism to the broader phenomenon of regulating international sports. This article remedies this gap, and in so doing enhances our understanding of the regulation of sport specifically, and of transnational legal and regulatory orders more broadly.

1 INTRODUCTION

Over the past fifty years both sport and regulation have undergone a revolution. Sport has been monetised and commercialised like never before. Many professional sports today are valued in the billions of dollars, and their profits (and the income of the athletes that compete in them) measured in the tens of millions of dollars.¹ Their financial success (and the survival of others) no longer comes from sales to supporters of memberships, tickets and merchandise, but from the rich revenue streams derived from the sale of broadcasting, streaming, sponsorship and other commercial rights, and from the opportunities created by new technologies such as online gambling and esports.² This has made sport more global and complex. It also has introduced into sports’ eco-systems, new actors and new relationships – creating both new opportunities and new threats. And as sport has grown and evolved, so too has the manner with which it is administered and organised. New institutions and new rules have been created to grasp the opportunities and address the threats created by its

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¹ See *Forbes*, *Sports Money* website <<https://www.forbes.com/sportsmoney/?sh=62d2e1a67ff6>> – accessed 17 June 2021.

² Thomas Pittz et al, ‘Sport Business Models: a Stakeholder Optimization Approach’ (2021) 28 (1) *Journal of Small Business and Enterprise Development* 134-147.

growth and globalisation. What has emerged is a transnational regulatory regime of great sophistication through which international sporting organisations make, administer and enforce rules that govern every important aspect of the competitions they administer.³

The ‘regulatory revolution’, while not as visible to the person on the street, is no less dramatic or important.⁴ Over the past fifty years, traditional state-centric law-based conceptions of regulation have been broadened to include actors and instruments that extend beyond the state and the law.⁵ Government no longer is the sole locus of regulatory activity. Rather, regulation today increasingly is collaborative, polycentric and networked, undertaken by a variety of different actors (state and non-state; public and private) across multiple sites (local, national and international).⁶ Nor is regulation confined to rules made and coercively enforced by the state. Rules also can be made by private (non-government) entities and imposed contractually and accepted voluntarily. And nor is the regulatory endeavour limited to rules. Modern regulators have at their disposal a broad range of regulatory tools designed variably to incentivise, persuade, assist and even nudge rule compliance.⁷ Numerous scholars who have examined this phenomenon have sought to attach a label to describe it. Black, for example, spoke of both ‘decentered’ and polycentric’ regulation: ‘decentered’ to draw attention away from the state as the central regulatory actor; and ‘polycentric’ to draw attention towards multiple sites of regulation.⁸ Minogue and Carino, on the other hand, employed the term ‘regulatory governance’ to capture the idea that for new and complex issues to be addressed effectively, one must go beyond formal rules to broader frameworks that involve the

³ ‘Transnational regulatory regime’ is a broad term used to describe regimes in which non-state actors make, implement and/or enforce rules and standards across national borders. See e.g., Antoine Duval, ‘Lex Sportiva: A Playground for Transnational Law’ (2013) 19(6) *European Law Journal* 822; Eric L Windholz and Graeme A Hodge, ‘International Sports Regulation: An Evolving Private-Public Partnership’ (2019) 45(2) *Monash University Law Review* 298; Natasha Tusikov, ‘Transnational non-state regulatory regimes’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 339-353.

⁴ Borrowing the descriptive label employed by Levi-Faur in David Levi-Faur, ‘The Global Diffusion of Regulatory Capitalism’ (2005) 598(12) *The Annals of the American Academy of Political and Social Sciences* 12-32, 27.

⁵ Graeme A. Hodge, ‘Public Policy and Administration in an Era of Regulatory Capitalism’ in Thomas R. Klassen, Denita Cepiku and T. J. Lah (eds) *Handbook of Global Public Policy and Administration* (Routledge, 2017) 15.

⁶ Eric L Windholz, *Governing through Regulation: Public Policy, Regulation and the Law* (Routledge, 2018) 27.

⁷ *Ibid* 170-82.

⁸ Julia Black, ‘Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World’ (2001) 54(1) *Current Legal Problems* 103-146; Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2 *Regulation & Governance* 137.

collaboration of a range of non-state actors;⁹ and Levi-Faur coined the term ‘regulatory capitalism’ to capture the global diffusion of what he saw as a new regulatory world order - one in which the traditional boundaries between state, markets and society are redrawn and from which hybrid regulatory regimes employing novel regulatory techniques emerge that extend beyond the state and national boundaries.¹⁰

The transnational regulatory regimes put in place by international sporting bodies such as the International Olympic Committee (IOC), the Fédération Internationale de Football Association (FIFA) and World Athletics (formerly the International Association of Athletics Federations), are excellent examples of this broadening of the regulatory endeavour. Yet the intersection of these two revolutions is not well studied. Few sports scholars have employed regulatory theory to examine the evolution of sports’ international regulatory order. And few regulatory scholars have focused their attention on the sporting endeavour. This is both surprising and regrettable. Surprising because sport inherently is a system of rules and thus, a regulatory system. Rules both constitute sport (without rules there is no sport – just play),¹¹ and shape and modify (regulate) the behaviours of those who engage in and with it. And regrettable because both stand to learn much from each other. Understanding sports’ governance through the regulatory lens offers the promise of interesting new insights about both the nature and shape of sports’ current transnational regulatory regimes, and how they may evolve in the future. As Levi-Faur reminds us, ‘[r]egulatory processes condition the operation, manipulation and deployment of political, social and economic power.’¹² And understanding how sports’ governing bodies have employed regulatory techniques to put in place highly effective transnational regulatory regimes may hold valuable lessons for the development of other systems of international law, governance and regulation.¹³

⁹ Martin Minogue and Ledivina V Carino, *Regulatory Governance in Developing Countries* (Edward Elgar, 2006).

¹⁰ Levi-Faur, ‘Global Diffusion of Regulatory Capitalism’ (n 4) 15.

¹¹ Borrowing and adapting the example of chess employed by J. Searle, ‘How to derive “ought” from “is”’ (1964) 3(1) *The Philosophical Review* 43-56, 55 (cited by David Levi-Faur, ‘Regulatory Capitalism’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 289-302, 296). Rules are central to most definitions of sport. See e.g., Allen Guttmann, *From Ritual to Record: The Nature of Modern Sports* (Columbia University Press, 2004); Bernard Suits, ‘The Elements of Sport’, in W. J. Morgan (ed.), *Ethics in Sport* (Human Kinetics, 2nd ed., 2007) 9, 11-12; Jay J. Coakley, *Sport in Society: Issues and Challenges* (Time Mirror/Mosby College Publishing, 4th ed., 1990) 10-11;

¹² Levi-Faur, ‘Regulatory Capitalism’ (n 11) 289.

¹³ Matthew J Mitten and Hayden Opie, ‘“Sports Law”: Implications for the Development of International, Comparative and National Law and Global Governance’ (2010) 85 *Tulane Law Review* 269. See also (Lorenzo Casini, ‘Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)’ (Paper presented at the Global Administrative Law Conference on Practical Legal Problems of International Organizations, Geneva, 20-21 March, 2009) 18.

This article brings these two areas of scholarship together by analysing sports' transnational legal and regulatory order through the lens of regulatory capitalism. Regulatory capitalism was chosen because it provides an insightful intellectual lens through which to examine transnational regulatory regimes and, because as will be seen, sports' transnational legal and regulatory order is, in many respects, quintessential regulatory capitalism.

This article proceeds in three substantive parts. First, the article explains sports' transnational regulatory order using its anti-doping regime as an exemplar. Next the article introduces and explains the concept of regulatory capitalism and employs it to examine and analyse sports' transnational regulatory order. And third, the article discusses some of the opportunities and challenges presented by examining sports' transnational regulatory order through the lens of regulatory capitalism.

2 INTERNATIONAL SPORTS' TRANSNATIONAL REGULATORY REGIME

International sport governing bodies have developed sophisticated transnational regulatory regimes through which they control every important aspect of the competitions they administer. In this section, we examine these regimes by reference to the three core elements of a regulatory regime: rule-making, rule-administration and rule-enforcement.¹⁴

A *Rule-making*

Sport governing bodies have developed detailed rules. These rules cover a broad range of topics, ranging from rules that determine which countries, teams and athletes may compete in their competitions, when and where; to rules that govern how national sporting federations and the competitions they administer are conducted; through to rules governing individual player conduct, such as anti-doping and corruption, respect and responsibility, vilification and discrimination, and investigation and disciplinary policies. Most of the rules are made by the sporting organisation itself. Examples include the IOC's Code of Ethics (and related documents); FIFA's Statutes; and World Athletics' Book of Rules.¹⁵ However, some have been outsourced to specialist agencies. An example of the

¹⁴ David Levi-Faur, Yael Kariv-Teitelbaum and Rotem Medzini, 'Regulatory Governance: History, Theories, Strategies, and Challenges' (2021) Oxford Research Encyclopedia of Politics. Retrieved 7 Oct. 2021, from <<https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1430>>.

¹⁵ See e.g., IOC, *Integrity* (December 2021) <https://olympics.com/ioc/integrity>; FIFA *Statutes* (August 2018) <https://resources.fifa.com/image/upload/the-fifa-statutes-2018.pdf?cloudid=whhncbdzio03cuhmwfsa>; World Athletics, *Book of Rules* (November 2019) <<https://www.worldathletics.org/about-iaaf/documents/book-of-rules>>.

latter is the World Anti-Doping Code written by the World Anti-Doping Agency (WADA).¹⁶ The WADA Code imposes obligations on athletes, support persons and officials not to engage in conduct that constitutes an anti-doping rule violation, and upon the IOC, International Paralympic Committee (IPC), international and national sport federations, and national anti-doping organisations, to have in place anti-doping rules and mechanisms to prevent, detect, investigate and sanction anti-doping rule violations and other breaches of the Code.¹⁷

The application of the WADA Code to national anti-doping organisations, which in most countries are government run or sanctioned bodies, is an interesting feature. The application of the Code to nation states has been codified in the International Convention Against Doping in Sport, adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 2005 and ratified by 191 nation states, making it the second most ratified of all UNESCO treaties.¹⁸ The Convention requires nation states to cooperate with WADA, each other and sporting organisations, to ensure appropriate measures are in place to support the Code and WADA in the discharge of its mission.¹⁹ In doing so, it provides the legal framework under

¹⁶ WADA is constituted as ‘an equal partnership between the Olympic Movement and public authorities’ (World Anti-Doping Agency, *Constitutive Instrument of Foundation of the Agence Mondiale Antidopage* (July 2014) World Anti-Doping Agency, Article 7 <<https://www.wada-ama.org/sites/default/files/resources/files/WADA-Revised-Statutes-4-July-2014-EN.pdf>>). This equality is reflected in the composition of WADA’s Board which is composed in equal parts by representatives from the Olympic Movement and government representatives (World Anti-Doping Agency, *Constitutive Instrument of Foundation of the Agence Mondiale Antidopage* (July 2014) World Anti-Doping Agency, Article 6 <<https://www.wada-ama.org/sites/default/files/resources/files/WADA-Revised-Statutes-4-July-2014-EN.pdf>>) and its financing, half of which comes from the IOC and half from various national governments (World Anti-Doping Agency, *Funding World Anti-Doping Agency* <<https://www.wada-ama.org/en/funding>>). Note that WADA also is empowered to invite a limited number of intergovernmental and other international organisations (e.g., World Health Organisation; Interpol; UNESCO) to act in a consultative capacity for the Foundation. These organisations, however, have no voting rights (World Anti-Doping Agency, *Constitutive Instrument of Foundation of the Agence Mondiale Antidopage* (July 2014) World Anti-Doping Agency, Article 6.5 <<https://www.wada-ama.org/sites/default/files/resources/files/WADA-Revised-Statutes-4-July-2014-EN.pdf>>).

¹⁷ The World Anti-Doping Code (2021) and its supporting Prohibited List (2021), International Standard for Testing and Investigation (2021), International Standard for Laboratories (2021), International Standard for Therapeutic Use Exemptions (2021), and International Standard for the Protection of Privacy and Personal Information (2021), are available from the WADA website <www.wada-ama.org>.

¹⁸ United Nations Education, Scientific and Cultural Organisation (UNESCO), *International Convention Against Doping in Sport* (19 October 2005) <<https://en.unesco.org/themes/sport-and-anti-doping/convention>>.

¹⁹ Ibid. See in particular Article 13 (Cooperation between anti-doping organizations and sports organizations), Article 14 (Supporting the mission of the World Anti-Doping Agency), and Article 15 (Article 15 (Equal funding of the World Anti-Doping Agency)).

which nation states can act, something the non-governmental WADA Code cannot do directly.

B *Rule-administration*

Administration of sports' rules is primarily contractual. The the contracts athletes, support persons and officials enter into require them to comply with the sporting organisations' rules, and with the administrative and enforcement mechanisms put in place to support them. These mechanisms vary with the size and sophistication of the sport governing body and the resources at its disposal. Internally, most organisations have dedicated teams devoted to ensuring compliance and detecting non-compliance with their rules. The IOC, for example, has an Ethics Commission, FIFA has the FIFA Integrity Department and World Athletics the Athletics Integrity Unit.²⁰ Externally, they have developed networks of member and affiliated organisations with whom they work cooperatively and collaboratively to implement and administer these rules. In the case of the IOC these are National Olympic Committees responsible for promoting the interests of the Olympic movement in their countries and sending athletes to the Olympic Games and the international sports federations responsible for the management, promotion and development of the sports that compete at those Games, two of which are FIFA and World Athletics. And in the case of international sports federations such as FIFA and World Athletics, its members are the national sports federations that administer, organise and supervise their sports at a country level. Through a series of cascading contracts, the requirements of the IOC's, FIFA's and World Athletics' statutes, regulations, directives and decisions are passed down to their member and affiliate organisations. These are then passed to their affiliated sub-national associations, leagues and clubs, and through them, to individual athletes and officials. As will be seen, these networks are a significant source of structural power.

Sporting organisations are supported in their efforts by the nation states in which they operate. Nation states have adopted policies and passed laws that simultaneously both respect and reinforce the autonomy of sporting organisations to administer their own affairs and intervene in support of that administration when called upon. In Australia, examples of the former include conferring on sports broad exemptions from the application of anti-discrimination, workers compensation and other legislation, and the judicial deference shown to sporting organisations' self-regulation of their internal affairs. And examples of supportive state interventions include conferring tax exempt status upon them special protections for their commercial and intellectual property rights and laws to assist sports in dealing with integrity

²⁰ See e.g., IOC, Ethics Commission <<https://olympics.com/ioc/ethics-commission>>; FIFA, Legal Integrity <<https://www.fifa.com/legal/integrity>>; World Athletics, Athletics Integrity Unit <<https://www.athleticsintegrity.org/>>.

threats such as cheating at gambling and drugs and doping.²¹ The latter is particularly instructive of this dynamic. While the imposition of WADA rules upon athletes and others involved in the sporting endeavour is a matter of contract, its effective administration relies heavily upon the hard coercive power of the state in the form of national anti-doping organisations and laws which will be recalled, nation states are required to provide under the UNESCO Convention Against Doping in Sport.²²

C Rule-enforcement

International sporting organisations have developed their own systems of enforcement, tribunals and jurisprudence to adjudicate upon the validity and enforcement of their rules. The specifics of rule-enforcement will depend upon the terms and conditions of the contract between the sporting organisation and the team, athlete or other person alleged to have committed a rule breach, the contract being the principal mechanism by which compliance with the rules is cascaded down to them.²³ Those contracts generally specify the process by which alleged rule breaches will be investigated, heard, determined and if proved, sanctioned. In the case of individual athletes, the contracts generally provide for rule breaches to be heard, determined and sanctioned by the relevant sporting organisation's internal dispute resolution mechanism. However, in some countries such as Australia and New Zealand for example, national sports tribunals have been established for that purpose.²⁴ And the WADA Code itself also provides for CAS performing that role for (and with the consent of) international and national level athletes, as well as an appellate role from internal and national sports tribunals.²⁵ CAS also performs an appellate role with respect to decisions concerning international and national sport governing bodies, such as the appeal brought by the Russian Paralympic Committee against the decision of the IPC suspending it from entering athletes in competitions sanctioned by the IPC for failing to comply with the IPC Anti-Doping and WADA Codes.²⁶

All of this makes CAS central to rule-enforcement, with some going so far as to describe CAS as the world's 'supreme court for sport'.²⁷ However, despite the

²¹ See e.g., *Olympic Insignia Protection Act 1987* (Cth).

²² While most national anti-doping agencies are public entities established by the state, some are private non-profit bodies. Examples of the latter are the Canadian Centre for Ethics in Sport and the United States Anti-Doping Agency.

²³ See discussion at n. 20.

²⁴ See for Australia, the National Sports Tribunal <<https://www.nationalsporttribunal.gov.au/>> and for New Zealand, the Sports Tribunal of New Zealand <<https://www.sporttribunal.org.nz/>>.

²⁵ WADA Code 2021, Articles 8.5 and 13.2.

²⁶ *Russian Paralympic Committee v. International Paralympic Committee* CAS 2016/A/4745.

²⁷ See e.g., Johan Lindholm, 'A legit supreme court of world sports? The CAS(e) for reform' (2021) 21 *The International Sports Law Journal* 1; Steffi Jose, 'From Sport's Kangaroo Court to Supreme

first word in its name, CAS is not a court of law. Rather, it is a private international arbitration tribunal based in Lausanne, Switzerland. CAS was established to overcome the problem of different national courts reaching inconsistent interpretations of the rules of the IOC and other international sporting organisations. As such, it is an important cog in the efforts of the international sporting community to apply and enforce a uniform set of rules uniformly.²⁸

Finally, it should be noted that sports' bespoke regulatory regimes operate alongside state laws of general application. Breach of a sporting rule might also constitute illegal or corrupt conduct under state law. An example of this was the recent doping case arising out of an undocumented supplements program run by the Essendon Football Club that competes in the Australian Football League (AFL). The club, players and officials involved in the program were sanctioned pursuant to the AFL's rules which adopted the WADA Code and were enforceable contractually; and in the case of the players, only after WADA exercised appeal rights vested in it by the Code to appeal the AFL's internal disciplinary tribunal's original decisions and have the matter determined by CAS. However, of interest is that the anti-doping investigation was triggered by an Australian Crime Commission investigation into links between organised crime and the supply of performance-enhancing drugs to sporting organisations,²⁹ and culminated in WorkSafe Victoria (the state occupational health and safety regulator) successfully prosecuting the Essendon Football Club for criminal breaches of the *Occupational Health and Safety Act 2004* (Vic) for failing to provide a safe workplace.³⁰

That sports' own rules sit alongside state rules creates the prospect of conflict between them, such as when states seek to regulate sports in a manner that interferes with their autonomy or otherwise in a manner they perceive not to be

Court: How the Court of Arbitration for Sport Can Legitimize Anti-Doping Law' (2013) 20 *Southwestern Journal of International Law* 402.

²⁸ For an overview of CAS, see e.g., Louise Reilly, 'Introduction to the Court of Arbitration for Sport (CAS) and the Role of National Courts in International Sports Disputes' (2012) *Journal of Dispute Resolution* 63; Matthew Mitten, 'The Court of Arbitration for Sport and its Global Jurisprudence: International Legal Pluralism in a World Without National Boundaries' (2014) 30(1) *Ohio State Journal on Dispute Resolution* 1.

²⁹ Australian Crime Commission, Organised Crime and Drugs in Sport (Commonwealth of Australia, 2013) - <<https://webarchive.nla.gov.au/awa/20130206062550/http://pandora.nla.gov.au/pan/138647/20130207-1231/www.crimecommission.gov.au/sites/default/files/files/organised-crime-and-drugs-in-sports-feb2013.pdf>>.

³⁰ WorkSafe Victoria, 'Essendon Football Club', *Prosecution Result Summaries and Enforceable Undertakings* (Web Page) <<https://www.worksafe.vic.gov.au/prosecution-result-summaries-enforceable-undertakings>>. See also Eric Windholz, 'In charging Essendon, WorkSafe puts all sport on notice', *The Conversation* (10 November 2015) at <<https://theconversation.com/in-charging-essendon-worksafe-puts-all-sport-on-notice-50396>>.

conducive to their interests. International sporting organisations are vigilant in guarding this aspect of their autonomy. The IOC and FIFA, for example, include in their rules a requirement that member and affiliates organisations maintain and preserve their autonomy and independence as a condition of membership.³¹ And both the IOC and FIFA have demonstrated a willingness to employ their contractual powers to suspend national teams from competing in their competitions to force governments to abandon legislation and other policies they consider interferes with their or their affiliates' governance of their competitions and sports. The Kuwaiti National Olympic Committee, for example, was suspended from the Olympic Movement from 2015 to 2019 because of interference by the Kuwaiti national government in its affairs.³² And Meier and Garcia identify 24 instances in which FIFA suspended a national association during the period 2003 to 2013, 19 of which were for government interference. Moreover, they report that in all instances, governments backed down with the matter resolved in line with FIFA's preferred solution – a clear example of the successful use by FIFA of its structural power.³³

On first appearances, sports transnational regulatory order exhibits many of the characteristics central to the new world regulatory order Levi-Faur coined the term 'regulatory capitalism' to describe – it is collaborative and hybrid and extends beyond the state and national boundaries. In the next Part we use the lens of regulatory capitalism to explore this more deeply.

3 REGULATORY CAPITALISM

The concept of regulatory capitalism, like many other powerful ideas, both combined and built upon a numerous themes emerging in the literature at the time. Scott, for example, had only the year before written about the 'post-regulatory state' to emphasise that we should be thinking of the modern regulatory endeavour in a manner that is not dependent on the state or state law.³⁴ Grabosky similarly argued that it was 'perhaps more useful nowadays to regard a regulatory system as consisting of layered webs of regulatory influence, of which conventional activities of regulatory agencies constitute but a few

³¹ International Olympic Committee (n 86) Rule 59; FIFA (n 86) Article 17.

³² International Olympic Committee, *Suspension of the Kuwait Olympic Committee* (27 October 2015) <<https://www.olympic.org/news/suspension-of-the-kuwait-olympic-committee>>. Most suspensions from the Olympic Movement have been for issues related to the waging of war, state sponsored racism and other forms of discrimination and, most recently, state sponsored doping.

³³ Henk Erik Meier and Borja Garcia, 'Protesting Private Transnational Authority against Public Intervention: FIFA's Power Over National Governments' (2015) 93 *Public Administration* 890.

³⁴ Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post-Regulatory State' in Jordana, J. and Levi-Faur, D. (eds.). *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edwrad Elgar, 2004, Cheltenham) 145-174.

strands.³⁵ And Vogel had been reflecting upon the reciprocal and mutually reinforcing relationship between capitalism and regulation pursuant to which the market itself becomes a regulatory mechanism - a phenomenon he described as 'freer markets; more rules'.³⁶

Levi-Faur brought these themes together in the concept of regulatory capitalism to reflect and describe a new division of labour between state, markets and society, not only through outsourcing and privatisation, but also through the increased sharing of regulatory responsibilities. Regulatory capitalism describes an inclusive and interconnected regulatory world in which businesses, civil society, professions and government all regulate. It is a world in which these actors cooperate and combine to produce hybrid, networked and polycentric forms of regulation employing new regulatory technologies: in which 'statist regulation coevolves with civil regulation, national regulation expands with international and global regulation, private regulation coevolves and expands with public regulation, business regulation coevolves with social regulation, voluntary regulations expand with coercive ones, and the market itself is used or mobilized as a regulatory mechanism'.³⁷

Regulatory capitalism also reflects regulation's increased role within society. As political, economic and social actors have become more interdependent and reliant on each other, being able to steer, direct and verify what each other is doing has become more important. This has seen regulation become the expanding part of governance,³⁸ and the emergence of governance triangles (of government, business and civil society) to steer and oversee the regulatory orchestra.³⁹ And finally, regulatory capitalism captures the global diffusion of this new regulatory world order – one made possible by the increasingly prominent and influential role played by international networks of experts. Regulation no longer is bound by nation states and national boundaries. It is both national and global in importance, scope, operation and impact.

³⁵ Peter Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8(4) *Governance* 527, 529.

³⁶ Steven Kent Vogel, *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries* (Cornell University Press, 1996).

³⁷ Levi-Faur, 'Regulatory Capitalism' (n 11) 293.

³⁸ John Braithwaite, Cary Coglianese and David Levi-Faur, 'Can Regulation and Governance Make a Difference?' (2007) 1 *Regulation & Governance* 1, 1.

³⁹ Kenneth W Abbott and Duncan Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State', in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009) 44-88; Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 *Vanderbilt Journal of Transnational Law* 501; Kenneth W Abbott et al, 'Two Logics of Indirect Governance: Delegation and Orchestration' (2016) 46(4) *British Journal of Political Science* 719-729.

‘Regulatory capitalism’ quickly gained a strong foothold among regulatory scholars. For Braithwaite, regulatory capitalism captured what was being seen at the time — ‘more capitalism; more regulation’.⁴⁰ It has since been used as both a theoretical and analytical lens with which to explain and examine regulatory regimes and regulatory change in a number of contexts, ranging from drug policy to the development of regulatory institutions in Africa; from welfare reform to business compliance with regulation.⁴¹ In this article regulatory capitalism is being used to examine sports’ transnational regulatory order. And while Levi-Faur observed that there is no one form of regulatory capitalism as it will vary according to historical, sectoral and national diversities,⁴² he nevertheless identified five specific factors which characterise regulatory capitalism.⁴³ It is against these five characteristics that we now assess sports’ transnational regulatory regime.

1 *A new division of labour between state and society (for example, privatisation)*

Sports’ transnational regulatory regime reflects a new and unusual division of labour between the state and non-government sector; not one of outsourcing by the state to the private sector normally associated with privatisation (the example provided by Levi-Faur), but of the opposite – of outsourcing by the private sector to the state. Whereas traditional public-private partnerships (PPPs) involve mechanisms through which the public sector coopts the private sector to assist it in delivering public sector objectives, here, the roles are reversed. The private sector (sport governing bodies) is co-opting the public sector (nation states) to assist it in delivering its private sector objectives.⁴⁴ States hosting and funding mega-sporting events such as the Olympics and sports’ world cups, and facilitating sports’ antidoping regime, are two of many examples. And whereas PPPs are often associated with increasing privatisation of the public sphere, here

⁴⁰ John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008) 11.

⁴¹ See e.g., Toby Seddon, ‘Drug Policy and Global Regulatory Capitalism: The Case of New Psychoactive Substances’ (2014) 25 *The International Journal of Drug Policy* 1019; Jonathan Klaaren, ‘The Emergence of Regulatory Capitalism in Africa’ (2021) 20 *Economy and Society* 100; Mike Raco, *State-Led Privatisation and the Demise of the Democratic State: Welfare Reform and Localism in an Era of Regulatory Capitalism* (Routledge, 2013); Christine Parker and Vibeke Nielsen, ‘The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism’ (2009) 5(1) *Annual Review of Law and Social Science* 45.

⁴² Levi-Faur, ‘Global Diffusion of Regulatory Capitalism’ (n 4) 16.

⁴³ *Ibid* 27.

⁴⁴ It is worthwhile pointing out here that while many (most) sport governing bodies do not operate as profit maximizing businesses, and do not so much compete in markets as they do monopolistically create, control, and regulate them, they nevertheless are commercial concerns.

we are dealing with the opposite – the ‘publicisation’ of the private sphere - a private-public partnership.⁴⁵

2 *An increase in delegation (remaking the boundaries between the experts and the politicians)*

Inherent in this new division of labour is an increase in delegation of regulatory responsibilities from the state to sporting organisations. We already have observed national states adopt policies and pass laws that both respect and reinforce the autonomy of sporting organisations to administer their own affairs. In sports’ transnational regulatory regimes, significant powers and discretion are vested in the hands of the experts that run the sports, and within WADA and CAS in particular. But the role played by experts goes further than delegation. Levi-Faur talks about remaking the boundaries between experts and politicians.⁴⁶ As we have seen, international sporting organisations increasingly are leading - setting both the agenda and the rules - with nation states (and athletes) relegated to the position of rule-takers. As Alison and Monnington observe, international sporting organisations such as the IOC and FIFA ‘have increasingly taken elite sport out of control of the politicians, governments and even the competitors themselves.’⁴⁷

3 *Proliferation of new technologies of regulation*

Levi-Faur states that ‘[o]ne of the most interesting indications of the rise of regulatory capitalism is [...] the rise of new instruments of regulation’,⁴⁸ describing it as a technological endeavour in search for better instruments of regulation.⁴⁹ Sports’ regulatory regimes are full of innovation, as they seek both to harness the opportunities presented by new technologies, and keep pace with those who would seek to evade and rort its rules. Examples of innovation include WADA and CAS themselves, the use of sophisticated data analytics to identify unusual betting trends that might indicate match-fixing or other corrupt

⁴⁵ Windholz and Hodge (n 3).

⁴⁶ Levi-Faur, ‘Global Diffusion of Regulatory Capitalism’ (n 4) 27.

⁴⁷ Lincoln Alison and Terry Monnington, ‘Sport, Prestige and International Relations’ in L Alison (ed), *The Global Politics of Sport: The Role of Global Institutions in Sport* (Routledge, 2005) 22.

⁴⁸ Levi-Faur, ‘Global Diffusion of Regulatory Capitalism’ (n 4) 22.

⁴⁹ Ibid 21.

conduct,⁵⁰ and the suite of innovative tools designed to detect and prevent doping in sport such as blood passports and sophisticated biological testing.⁵¹

4 *Formalisation of inter-institutional and intra-institutional relations and the proliferation of mechanisms of self-regulation in the shadow of the state*

The next characteristic identified by Levi-Faur is formal institutional arrangements. Levi-Faur specifically relates this to self-regulation which he suggests takes place in the shadow of the state. There are two points to be made here. First, we have observed that compliance with sports' rules is achieved through a series of cascading contracts, starting from international sporting federations; passing through regional, national and local federations, to clubs, individual athletes and officials. Such has been the formalisation of this 'pyramid structure of competitions from grassroots to elite level and organised solidarity mechanisms between the different levels and operators, the organisation of sport on a national basis, and the principle of a single federation per sport', that the European Commission has identified it as one of two features that give sport its specificity and differentiates it from other areas of human activity.⁵² Indeed such is the cognitive legitimacy of the pyramid template that failure to follow it can act as a barrier to an activity's acceptance as a sport; a fate esports currently is encountering.⁵³ Second, sports self-regulation does not occur in the shadow of the state, as Levi-Faur suggested. There is nothing hidden or subtle about the manner with which sports govern the private-public partnership they have

⁵⁰ See e.g., Susanne Ellens, 'Can We Catch the Crooks: Examining Performance Metrics of Match-Fixing Association Football Players' (Thesis is submitted in fulfilment of the requirements for the award of Masters by Research, Institute for Health and Sport, Victoria University, November 2019); Minhyeok Tak, Chang-Hwan Choi, Michael P Sam, 'Odds-Wise View: Whose Ideas Prevail in the Global Integrity Campaigns Against Match-Fixing?' (2021) *International Review for the Sociology of Sport* <<https://doi.org/10.1177/10126902211045681>>.

⁵¹ See e.g., Alan R Vernec, 'The Athlete Biological Passport: an Integral Element of Innovative Strategies in Antidoping' (2014) 48 *British Journal of Sports Medicine* 817; Carsten Lundby, Paul Robach, and Bengt Saltin, 'The Evolving Science of Detection of "Blood Doping"' (2012) 165(5) *British Journal of Pharmacology* 1306.

⁵² European Commission, *White Paper on Sport* (COM(2007) 391 Final) 14. The other factor is "the specificity of sporting activities and of sporting rules, such as separate competitions for men and women, limitations on the number of participants in competitions, the need to ensure uncertainty concerning outcomes and competitions and to preserve a competitive balance between clubs taking part if the same competitions". Cf. Beloff who argues that '[n]one of these factors seem to me of themselves to differentiate sport in any important sense from other areas of human activity, and all are subject to exceptions.' (Michael J Beloff QC, 'Fourth Edward Grayson Memorial Lecture: The Specificity of Sport Rhetoric or Reality?' (2011) 19 *Sport and the Law Journal* 88.

⁵³ Eric Windholz, 'Governing Esports: Public Policy, Regulation and the Law', (2020) *Sports Law eJournal* <<https://slej.scholasticahq.com/article/13241-governing-esports-public-policy-regulation-and-the-law>>. An institution has 'cognitive legitimacy' when its existence is accepted as necessary or inevitable such that its existence is no longer debated (Windholz (n 6) 116).

created. More often than not, they are the dominant partner in making, administering and enforcing the rules. It arguably is more an example of globalisation emasculating the state, than operating in its shadow.⁵⁴

5 *The growth in the influence of experts in general and of international networks of experts in particular*

The rise of international regimes is one of regulatory capitalism's defining characteristics. In the world of regulatory capitalism, these regimes are the product of 'knowledge actors' – whom Levi-Faur describes as 'transnational networks of technocrats and professions' exporting and importing regulatory orders, institutions and knowledge developed in the centre (which he describes as 'leading countries' or the North) to the periphery (or the South).⁵⁵ Central to the successful operation of these knowledge actor networks is recognition that policy makers operate under conditions of complexity, uncertainty and knowledge and time limitations, and often turn to knowledge actors to both diagnose and frame the problem, and offer and implement solutions to it.⁵⁶ Thus, their knowledge becomes a source of influence and power.⁵⁷ While there are numerous examples of policy transfers in the international sporting arena,⁵⁸ those that have inquired into the role played by knowledge actors suggest their impact is minimal, at least when compared to the role played by major institutional actors such as the IOC, key international sporting federations and, in the case of anti-doping, the Council of Europe and now the European

⁵⁴ As Levi-Faur, 'Global Diffusion of Regulatory Capitalism' (n 4) 17 colourfully describes it, referencing Susan Strange, *The Retreat of the State* (Cambridge University Press, 1996).

⁵⁵ Levi-Faur, 'Global Diffusion of Regulatory Capitalism' (n 4) 28. There are several theories and frameworks that purport to explain how knowledge actors operate and impact the policy process. Levi-Faur refers to the work of: Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004) who talks about formal and informal networks of information, enforcement and harmonisation; Diane Stone, 'Transfer Agents and Global Networks in the "Transnationalisation" of Policy' (2004) 11 *Journal of European Public Policy* 545 who talks about networks that specialise around issues and sectors and develop their own discourse and hierarchies; and Meyer et al, 'World Society and the Nation-State' (1997) 103 *American Journal of Sociology* 144 and Peter M Haas, 'Introduction: Epistemic Communities and International Policy Co-ordination' (1992) 46 *International Organisation* 1 who talk about 'world societies' and 'epistemic communities' that develop common understandings of problems, challenges and solutions.

⁵⁶ Emmanuel Adler and Peter M Haas, 'Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program' (1992) 46 *International Organisation* 367; Barrie Houlihan, 'Antidoping Policy in Sport: The Politics of International Policy Co-ordination' (1999) 77 *European Forum* 311, 316.

⁵⁷ Haas (n55); Adler and Haas (n 56).

⁵⁸ See Barrie Houlihan, 'Sports Policy Convergence: a Framework for Analysis' (2012) 12 *European Sport Management Quarterly* 111-135, 127.

Commission.⁵⁹ In the context of global change, Levi-Faur distinguishes between ‘top-down’, ‘bottom-up’ and ‘horizontal’ approaches.⁶⁰ Of these, the ‘top down’ approach best describes the global diffusion and adoption of sports’ regulatory order – one in which the IOC, WADA and other international sporting federations operate as ‘command and control institutions’ employing their systemic power to drive systemic change across multiple national policy makers. And one source of their systemic power is their ‘in-house’ subject-matter expertise that governments find difficult to replicate. This can create an ‘information asymmetry’ that enables sports’ experts to play a greater role in both shaping and operationalising sport policy. And with their transnational reach, they can deploy and leverage their expertise across multiple jurisdictions, enabling them to influence regulatory agendas at both the national and global level. As Mitten and Opie observe with respect to CAS, its ‘specialized sports law expertise renders final and binding decisions having global recognition and effect.’⁶¹

4 DISCUSSION: OPPORTUNITIES AND CHALLENGES

This article has established that sports’ transnational regulatory regimes, and its global anti-doping regulatory regime in particular, are quintessential examples of regulatory capitalism. They are polycentric – operating at both the transnational and national level – and across 191 nations (being the signatories to the UNESCO Convention).⁶² They also are hybrid and innovative, comprising of public and private organisations working in partnership and employing novel mixes of contractual, administrative, criminal, scientific and technical tools to achieve their goals. And they are networked – with international and national sporting organisations, WADA and national anti-doping agencies, and CAS, forming sophisticated webs of actors working cooperatively and collaboratively to achieve collective goals – which networks are coordinated by sports’ peak international bodies and the experts within them.

Sports transnational regulatory regimes leverage many of the advantages that comes from networked polycentricity and hybridity. They bring together different actors’ resources, knowledge, skills and expertise in furtherance of sports’ objectives, and combine them in a complimentary and synergistic manner. This creates opportunities for imaginative and complimentary combinations of regulatory actors and instruments tailored to the causes and context of the issue at hand, which Gunningham and Grabosky advise is the key to ‘smart regulation’

⁵⁹ Houlihan, ‘Antidoping Policy in Sport’ (n 56) 316. See also Jack Anderson, ‘The EU’s Role on Doping in Sport’ in Jack Anderson, Richard Parrish and Borja Garcia (eds), *Research Handbook on EU Sports Law and Policy* (Edward Elgar, 2018) 79-97.

⁶⁰ Levi-Faur, ‘Global Diffusion of Regulatory Capitalism’ (n 4) 27.

⁶¹ Mitten and Opie (n 13) 285.

⁶² See discussion at n 18.

and designing better regulatory regimes.⁶³ They also bring scale to implementation. Many hands make light work.

However, complex hybrid and polycentric regimes are not without their challenges. These challenges can usefully be grouped under the headings of functional, normative and democratic.⁶⁴ Each of these challenges and the performance of sports' transnational regulatory regimes against them are discussed below.

A *Functional challenges*

In hybrid polycentric regulatory regimes, regulatory roles and responsibilities are dispersed amongst a number of participants. This presents significant functional challenges. Many hands also can pose a problem.⁶⁵ The greater a regime's polycentricity, the more difficult coordination is to achieve. How do you coordinate a polycentric regime's many (and otherwise autonomous) parts? How do you prevent fragmentation and disharmony? And in the case of transnational regulatory regimes, how do you bridge the traditional divide between public and private; national and global? ⁶⁶ Most sports score well on the functional challenge. We have observed that while sports' transnational regimes are decentered in the sense that the state is not the central locus of regulatory activity, there are still strong coordinating actors conducting the regulatory orchestras: the IOC generally, international sporting federations for their sports, and WADA for doping. CAS also plays an important role, providing a central forum through which regime regulators can achieve consistent interpretation and enforcement of their rules. These actors have exercised their monopoly power (contractual and structural) over athletes, others engaged in the sporting endeavour, and nation states, to achieve a very high level of coherence and consistency.

B *Normative Challenges*

The normative challenge relates to the principles (norms) according to which sports' regulatory regimes should operate, and how participants' different interests, values and perspectives should be balanced.⁶⁷ Here sports' score card is more ambiguous. First, given the number and variety of actors involved in sports' regulatory regimes, there is a strong likelihood that not all participants will

⁶³ Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998).

⁶⁴ These categories are principally distilled from the work of Black, 'Constructing and Contesting Legitimacy and Accountability' (n 8); and Levi-Faur, Kariv-Teitelbaum and Medzini (n 14).

⁶⁵ D F Thompson, 'The Moral Responsibility of Public Officials: The Problem of Many Hands' (1980) 74(4) *American Political Science Review* 905-916.

⁶⁶ Scott (n 34).

⁶⁷ Black, 'Constructing and Contesting Legitimacy and Accountability' 141.

share all the norms on which it is based. Take WADA and the anti-doping regime for example. As Houlihan et al note, the fight against doping in sport is stronger and more effective today than in the 1990s.⁶⁸ Much of this is attributable to the impact of WADA over the last 20 years; its ability to establish itself as the leading organisation in global anti-doping efforts and to put in place a global infrastructure that effectively coordinates individual sports' and nation states' anti-doping efforts. At the same time however, doping persists and, in some cases, has been conducted on an industrial scale such as in Russia. Houlihan et al attribute this to sports' 'tangle of competing interests (political, commercial, legal and organisational)', and 'the large number of stakeholders who are variously apathetic, belligerent or subversive' and who have undermined the effectiveness of WADA and the global anti-doping regime.⁶⁹

Second, there is the question of regime 'rightness and fairness' – or what Levi-Faur, Kariv-Teitelbaum and Medzini refer to as the 'value of justice' challenge.⁷⁰ Numerous commentators point to what they consider to be abuses by sporting organisations of the monopoly power they exercise over their sports.⁷¹ The contracts athletes are required to sign generally restrict their freedom of movement (i.e. their ability to move from one employer to another), as well as their freedom of speech and association (through the presence of broad behavioural covenants). They also invariably require athletes to consent to the jurisdiction of CAS and to abide by the anti-doping regime promulgated by WADA. CAS, in turn, has been criticized for failing to secure the due process rights of athletes,⁷² and WADA for sacrificing the fundamental civil rights of

⁶⁸ Barrie Houlihan et al, 'The World Anti-Doping Agency at 20: Progress and Challenges' (2019) *International Journal of Sport Policy and Politics* 193, 200.

⁶⁹ Ibid 200. See also Marina Neheme and Catherine Ordway, 'Governance and Anti-Doping: Beyond the Fox and the Hen House' in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing, 2016) 207-231.

⁷⁰ Levi-Faur, Kariv-Teitelbaum and Medzini (n 14).

⁷¹ See e.g., Thane N Rosenbaum, 'The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era' (1987) 41 *University of Miami Law Review* 729; Walter Adams and James W Brock, 'Monopoly, Monopsony and Vertical Collusion: Antitrust Policy and Professional Sports' (1997) 42 *Antitrust Bulletin* 721; Stephen F Ross, 'Competition Law as a Constraint on Monopolistic Exploitation by Sports Clubs and Leagues' (2003) 19 *Oxford Review of Economic Policy* 569; Bob Stewart, Matthew Nicholson and Geoff Dickson, 'The Australian Football League's Recent Progress: A Study In Cartel Conduct And Monopoly Power' (2005) 8 *Sport Management Review* 95; Nathaniel Grow, 'Regulating Professional Sports Leagues' (2015) 72 *Washington & Lee Law Review* 573.

⁷² See e.g., Jason Gubi, 'The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns' (2008) 18 *Fordham Intellectual Property, Media and Entertainment Law Journal* 997; Nathan Deakes, 'Match Fixing in Football: The Epistemology of the Court of Arbitration for Sport Jurisprudence' (2014) 9 *Australian and New Zealand Sports Law Journal* 57; Paul J Hayes, 'Alchemy, the "Golden Fleece" and Sporting Justice: Whither the Court of Arbitration for Sport?' (Paper presented at the 25th Annual Australian and New Zealand Sports Law Association Conference, Melbourne, 14-16 October 2015).

athletes in the fight against doping, critics pointing to the WADA Code's reversal of the presumption of innocence, imposition of mandatory penalties, infringements upon the rights to silence and privacy, and its use of collective punishments.⁷³ Sports regulatory regimes tend to operate to the advantage of those with power, and to the detriment of those without (or with less) power.

C *Democratic Challenges*

The fact that sport has 'values of justice' issues is not totally surprising. Some stem from the narrowness of perspectives involved in fashioning its norms and principles. This brings us to regulatory capitalism's democratic challenges. These relate to issues of representation - who should be involved in decision-making, at which level and how? We have observed that the shape and nature of sports' transnational regulatory regimes have been forged 'top down' by sports' international governing bodies and their experts. A number of consequences flow from this. First, the centrality of the role played by experts means they can infuse the regimes with characteristics that reflect their own world view and historical and socio-cultural context.⁷⁴ In the case of international sporting organisations, the world view is overwhelmingly Western (and predominately European where most are domiciled).⁷⁵ And within these organisations, the membership of their boards tends to be older and male.⁷⁶ They hardly are representative of the universality of nations and athletes that compete in them.⁷⁷

Second, and importantly, athletes generally do not have a direct role in the election of their boards.⁷⁸ As such there is an inherent democratic deficit. Accountability to athletes tends to be indirect, filtered through international and national sporting federations. And while a number of sporting organisations

⁷³ See e.g., Paul Horvath, 'Anti-Doping and Human Rights in Sport: The Case of the AFL and the WADA Code' (2006) 32 *Monash University Law Review* 357; Andrew Byrnes, 'Human Rights and the Anti-Doping Lex Sportiva - The Relationship of Public and Private International Law, 'Law Beyond the State' and the Laws of Nation States' in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing, 2016) 81-104.

⁷⁴ Tusikov (n 3) 341.

⁷⁵ See e.g., Anderson (n 59); Johan Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence: An Empirical Inquiry into Lex Sportiva* (TMC Asser Press 2019).

⁷⁶ See e.g., Johanna Adriaanse, 'Gender Diversity in the Governance of Sport Associations: The Sydney Scoreboard Global Index of Participation' (2016) 137(1) *Journal of Business Ethics* 149; Annelies Knoppers, Ramon Spaaij and Inge Claringbould, 'Discursive Resistance to Gender Diversity in Sport Governance: Sport as a Unique Field?' (2021) 13(3) *International Journal of Sport Policy and Politics* 517.

⁷⁷ See e.g., Anderson (n 59); Lindholm, (n 75) (esp. Ch. 9).

⁷⁸ See e.g., Jörg Krieger, 'The Missing Involvement of Athletes in the Governance of International Athletics: A Historical Perspective' 1(2) *Journal of Olympic Studies* 93; Arnout Geeraert, Jens Almc, and Michael Grolle, 'Good Governance in International Sport Organizations: An Analysis of the 35 Olympic Sport Governing Bodies' (2014) 6(3) *International Journal of Sport Policy and Politics* 281.

recently have created athletes' committees, they generally position athletes as stakeholders whose views are to be heard, rather than a partner with a seat at the decision-making table.⁷⁹

And third, the lack of a meaningful athlete voice is compounded by the absence from sports global regulatory order of civil society non-governmental organisations. As such there is no governance triangle in which civil society bodies act as counter-veiling forces and supervisors of both sports' private actors and public authorities.⁸⁰ This is especially problematic in the context of sports global anti-doping regulatory regime where nation states share (some might say cede) significant authority and sovereignty over sports matters (and the civil rights of their citizens) to private international bodies such as the IOC, WADA and CAS.⁸¹

There are signs this might be changing, however. Power dynamics evolve, and new actors with power and resources not as accepting of the status quo can emerge. This may lead them to seek to re-open existing compacts, or to create new sites for political and legal consternation and debate.⁸² For example, we are seeing brave athletes challenge the use by sporting organisations of their monopoly power on human rights and other public policy grounds. A recent example of this was Claudia Pechstein's challenge in the Munich Municipal Court to being compelled by the International Skating Union to have her anti-doping dispute heard by CAS, a body she argued was not independent and impartial.⁸³ While ultimately unsuccessful, it nevertheless led CAS to change the nomination process for its list of arbitrators to make it more representative; an acknowledgement from CAS that it should better respect athlete rights.⁸⁴

⁷⁹ John Gleaves and Ask Vest Christiansen, 'Athletes' Perspectives on WADA and the Code: A Review and Analysis' (2019) 11(2) *International Journal of Sport Policy and Politics* 341-353.

⁸⁰ Abbott and Snidal, 'Strengthening International Regulation Through Transnational New Governance' (n 39).

⁸¹ Mitten and Opie (n 13) 285.

⁸² See Edward S Cohen, 'Investment Law as a Window Into the Pluralism of Transnational Legal Orders' (Paper presented to the Annual Meeting of the Law & Society Association, Toronto, Canada, 7-10 June 2018).

⁸³ Andrew Smith, 'The Pechstein Judgment: CAS's Reaction and Potential Ramifications' *Law in Sport* (17 April 2015) <<https://www.lawinsport.com/topics/sports/item/the-pechstein-judgment-cas-s-reaction-potential-ramifications>>; Despina Mavromati, 'The Legality of the Arbitration Agreement in Favour of CAS (Pechstein) Part 1' *Law in Sport* (6 July 2016) <<https://www.lawinsport.com/topics/articles/item/the-legality-of-the-arbitration-agreements-in-favour-of-cas-pechstein-part-1>>; Despina Mavromati, 'The Legality of the Arbitration Agreement in Favour of CAS (Pechstein) Part 2' *Law in Sport* (6 July 2016) <<https://www.lawinsport.com/topics/sports/item/the-legality-of-the-arbitration-agreements-in-favour-of-cas-pechstein-part-2>>.

⁸⁴ Ulrich Haas, 'Role and Application of Article 6 of the European Convention on Human Rights in CAS Procedures' (2012) 12(3) *International Sports Law Review* 43, 46; Antoine Duval, 'The Court of Arbitration for Sport after Pechstein: Reform or Revolution?' on Antoine Duval,

There also have been instances of nation states (re)asserting themselves. For example, some nation states have extended their anti-doping regimes beyond the parameters sanctioned by WADA. An example of this is the *Rodchenkov Anti-Doping Act* that gives United States officials the power to prosecute individuals for doping schemes at international sports competitions involving American athletes.⁸⁵ This has led some commentators to query whether the future of sports anti-doping regime may lie more in the hands of nation states than WADA.⁸⁶

And recently we have witnessed the emergence of new actors with counter-veiling power and legitimacy who have been able to extract changes and concessions from international sporting organisations, including the IOC and FIFA. For example, human rights groups have successfully lobbied both organisations to have human rights standards included in host city contracts.⁸⁷ We also have seen them play a greater role in issues concerning racism and other forms of abuse in sport, often off the back of a legitimacy threatening crisis.⁸⁸ And we increasingly are seeing sponsors play an active role, especially in circumstances where the sports organisation's actions do not match the values to which their sponsors aspire, thereby potentially placing their commercial interests at risk. In this regard, FIFA's sponsors have been credited with forcing FIFA President Sepp Blatter to step down after pressure from affiliated national

Asser International Sports Law Blog (17 November 2015) <<http://www.asser.nl/SportsLaw/Blog/post/the-court-of-arbitration-for-sport-after-pechstein-reform-or-revolution>>.

⁸⁵ Michael Pavitt, 'Rodchenkov Claims Doping Act a "Game-Changer" as US Vows to "Aggressively" Enforce' *Inside the Games* (online, 12 April 2021) <<https://www.insidethegames.biz/articles/1106544/rodchenkov-act-gamechanger-anti-doping>> accessed 21 June 2021.

⁸⁶ Barrie Houlihan, 'Building an International Regime to Combat Doping in Sport' in R Levermore and A Budd (eds), *Sport and International Relations: An Emerging Relationship* (Routledge, 2004) 62, 74; Slobodan Tomic and Rebecca Schmidt, 'Sports Anti-Doping Bodies Won't Reform Themselves, But Nation States Can Break the Deadlock', *The Conversation* (online, 24 September 2018) <<https://theconversation.com/sports-anti-doping-bodies-wont-reform-themselves-but-nation-states-can-break-the-deadlock-103636>>.

⁸⁷ International Olympic Committee, *IOC Strengthens its Stance in Favour of Human Rights and Against Corruption in New Host City Contract* (28 February 2017) <<https://www.olympic.org/news/ioc-strengthens-its-stance-in-favour-of-human-rights-and-against-corruption-in-new-host-city-contract>>; FIFA, *Guide to the Bidding Process for the 2026 FIFA World Cup* <<https://img.fifa.com/image/upload/hgopypqftviladnm7q90.pdf>>.

⁸⁸ See e.g., Brendan Schwab, 'Protect, Respect and Remedy: Global Sport and Human Rights [2019] 3 *International Sports Law Review* 52; Daniel West, 'Revitalising a Phantom Regime: the Adjudication of Human Rights Complaints in Sport' (2019) 19 *The International Sports Law Journal* 2. And generally the website of the Centre for Sport & Human Rights - <<https://www.sporhumanrights.org/about-us/>>.

federations, and the governments of those nations failed to prevent his re-election.⁸⁹

While the rise of the athletes' voice and a more prominent role for civil society and commercial actors largely is because of perceived failures of sporting organisations to strike appropriate balances when dealing with 'value of justice' challenges, their inclusion is consistent with the tenets of responsive and smart regulation, and their more recent incarnation as the governance triangle. And it also is consistent with regulatory capitalism, reflecting the intertwining of society, the economy and politics via regulatory instruments and institutions.⁹⁰ It may be that sport has something to learn from other sectors that have successfully addressed long-standing democratic deficits and closed the governance triangle (to adapt the well-known expression) by including workers and civil society actors within their regulatory standard-setting frameworks, such as has occurred in the areas of worker rights and environmental protection.⁹¹

5 CONCLUSION

Globalisation has led to a reorientation of the role of the state, and the emergence of new forms of polycentric, networked and hybrid governance.⁹² Sports' global regulatory regimes, and its anti-doping regime in particular, are emblematic of this change and of regulatory capitalism on a global scale. They reflect the growth in scope, importance, and impact of regulation at the national and global levels, the growing investments by political, economic, and social actors in regulation in general and regulatory strategies in particular, and the ever closer intertwining of society, the economy and politics via regulatory instruments and institutions – all characteristics identified by Levi-Faur as central to regulatory capitalism.⁹³

To date sport has been able to forge a largely coherent, stable and resilient global regulatory order. In this there are lessons for the development of other systems of international regulation. But sports' global regulatory regimes are not static; they evolve. The more prominent role being played by athletes, civil

⁸⁹ See e.g., Claire Phipps and Damien Gayle, 'Fifa Crisis: Visa Sponsorship Threat Compounds Calls for Blatter to Resign', *The Guardian* (online, 28 May 2015) <<https://www.theguardian.com/football/2015/may/28/fifa-crisis-blatter-calls-resign-sponsors-disappointment>>; BBC, 'Sepp Blatter: Coca-Cola Among Sponsors Saying Fifa Boss Must Go', *BBC Sport* (online, 2 October 2015) <<https://www.bbc.com/sport/football/34430729>>; Omnisport, 'Major FIFA Sponsors Call for Blatter to Resign Immediately', *SBS* (online, 3 October 2015) <<https://theworldgame.sbs.com.au/major-fifa-sponsors-call-for-blatter-to-resign-immediately>>.

⁹⁰ Levi-Faur, 'Regulatory Capitalism' (n 11) 299.

⁹¹ Abbott and Snidal (n 39).

⁹² Levi-Faur, 'Global Diffusion of Regulatory Capitalism' (n 4); Braithwaite (n 40).

⁹³ Levi-Faur, 'Regulatory Capitalism' (n 11) 299.

society actors and business in the regimes is an example of this evolution. Sports' ability to adapt to these changes and to bring these actors together in furtherance of its objectives will be key to its future success. How other sectors have managed these challenges will hold lessons for international sport. Recognition of the application of regulatory capitalism to international sport provides a common analytical lens through which these lessons can be drawn.