

# INTERNATIONAL SPORTS REGULATION: AN EVOLVING PRIVATE-PUBLIC PARTNERSHIP

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*Globalisation has seen regulation move beyond the state. International sports offer a strong example, with the evolution of an extensive system of global regulation and law. The creation of the Court of Arbitration for Sport, the development of the world anti-doping regime, and more recent efforts to battle corruption, are but a few of its more prominent elements. A significant feature of this system is the international partnering of private and government bodies. However, this partnership is not without its challenges. Its evolution reveals inherent tensions between international and national regulatory regimes, as international sporting organisations challenge the sovereignty of the nation-state. This article critically examines the evolving private-public partnership that is international sports regulation. In particular, it investigates two case studies: the International Olympic Committee and the Fédération Internationale de Football Association. The intellectual lenses of public-private partnership and of power are adopted to analyse these cases. The social, cultural, political and economic importance of sport makes examining the evolution of international sports regulation an interesting and valuable exercise. Studying it also potentially offers valuable insights and lessons for the development of international regulatory systems and global law-making more broadly.*

## I INTRODUCTION

Globalisation has seen regulation move beyond the state. In the past 40 years we have witnessed attempts to develop systems of global governance and transnational legal and regulatory regimes<sup>1</sup> to address issues that know no borders. These issues range from the economic to the social — from international trade and

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1 Governance literature often talks in terms of ‘global’ regimes whilst the regulatory and legal literature mentions ‘transnational’ arrangements. In this article, we use the two terms interchangeably.

investment, to public health, environment protection, and human rights.<sup>2</sup> While the success of these arrangements vary and in many cases is contested, very few regimes are as coherent, settled and effective as the extensive system of global regulation and laws put in place by international sporting organisations such as the International Olympic Committee ('IOC') and the Fédération Internationale de Football Association ('FIFA').<sup>3</sup>

International sporting organisations such as the IOC and FIFA have developed sophisticated transnational (indeed, global) regulatory and legal orders through which they control every important aspect of the competitions they administer. They determine which countries and athletes compete in their competitions, when and where, as well as the rules and policies according to which those countries and athletes (and other officials) conduct themselves. These rules cover a broad range of topics including player eligibility and transfer, anti-doping and corruption, respect and responsibility, and vilification and discrimination. Moreover, international sporting organisations have developed their own system of enforcement, tribunals and jurisprudence to adjudicate upon the validity and enforcement of those rules. Most prominent among these are the creation of the Court of Arbitration for Sport ('CAS') to adjudicate disputes arising under sporting contracts, and the World Anti-Doping Agency ('WADA') to promulgate and enforce rules against doping in sport.

The global system they have developed is not without its critics, however. While CAS's procedures were recently found to comply with the *European Convention of Human Rights* ('ECHR') art 6 due process requirements,<sup>4</sup> numerous commentators nevertheless point to what they consider to be abuses by sporting organisations of the monopoly power they exercise over their sports.<sup>5</sup> The contracts athletes are required to sign generally restrict their freedom of movement (ie, their ability

- 2 For a discussion and illustration of the breadth and depth of issues on the subject of global or transnational regulatory arrangements, see Thomas G Weiss and Rorden Wilkinson (eds), *International Organization and Global Governance* (Routledge, 2<sup>nd</sup> ed, 2018).
- 3 As Allison observes, international sporting organisations 'operate at a level of coherent global power unknown to aspirants in fields such as the environment and human rights': Lincoln Allison, 'Sport and Globalisation' in Lincoln Allison (ed), *The Global Politics of Sport: The Role of Global Institutions in Sport* (Routledge, 2005) 1, 2.
- 4 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). One exception to this compliance is a breach that was held to have arisen with respect to the lack of a public hearing for doping offences: see *Mutu and Pechstein v Switzerland* (European Court of Human Rights, Chamber, Application No 40575/10 and No 67474/10, 2 October 2018). A pending case, *Bakker v Switzerland* (Application No 7198/07), will also raise issues regarding due process and CAS.
- 5 See, eg, Thane N Rosenbaum, 'The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era' (1987) 41(4) *University of Miami Law Review* 729; Walter Adams and James W Brock, 'Monopoly, Monopsony, and Vertical Collusion: Antitrust Policy and Professional Sports' (1997) 42(3) *Antitrust Bulletin* 721; Stephen F Ross, 'Competition Law as a Constraint on Monopolistic Exploitation by Sports Leagues and Clubs' (2003) 19(4) *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(2) *Sport Management Review* 95; Nathaniel Grow, 'Regulating Professional Sports Leagues' (2015) 72(2) *Washington & Lee Law Review* 573.

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. The WADA regime, in turn, raises due process and human rights concerns. It reverses the presumption of innocence, imposes mandatory penalties, infringes upon rights to silence and privacy, and imposes collective punishments.<sup>6</sup>

Given these concerns one is entitled to ask ‘what role is played by national governments?’ The answer to this question is generally one of close collaboration. Indeed, a significant feature of the global regulatory and legal order in sport is the collaborative arrangement established between the public and private parties. The governance of global sport involves a mixing of both private international sporting organisations and public (government) institutions. Historians such as Wettenhall nominate hallmark events such as international trade fairs or the Olympic Games as one of several ‘theatres’ of mixing public and private endeavours throughout history.<sup>7</sup> Others describe the collaborative arrangements through which sport infrastructure such as stadiums are provided more directly and label such arrangements a public-private partnership (‘PPP’).<sup>8</sup> The PPP label has also been applied to describe social partnerships between government organisations and sport,<sup>9</sup> and the manner with which governments and sporting organisations have cooperated to address the use of performance enhancing drugs in sport.<sup>10</sup>

However, this partnership is not without its challenges. Its evolution reveals inherent tensions between the power of international sporting organisations and the sovereignty of the nation-state. International sporting organisations possess

- 6 See, eg, with respect to CAS: Jason Gubi, ‘The Olympic Binding Arbitration Clause and the Court of Arbitration for Sport: An Analysis of Due Process Concerns’ (2008) 18(4) *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(1) *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?’ (Presentation, Australian and New Zealand Sports Law Association Annual Conference, Melbourne, 16 October 2015). With respect to WADA: Paul Horvath, ‘Anti-Doping and Human Rights in Sport: The Case of the AFL and the WADA Code’ (2006) 32(2) *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.
- 7 See Roger Wettenhall, ‘The Public-Private Interface: Surveying the History’ in Graeme Hodge and Carsten Greve (eds), *The Challenge of Public-Private Partnerships: Learning from International Experience* (Edward Elgar, 2005) 22, 35.
- 8 See, eg, Martijn van den Hurk and Koen Verhoest, ‘The Governance of Public-Private Partnerships in Sports Infrastructure: Interfering Complexities in Belgium’ (2015) 33(1) *International Journal of Project Management* 201.
- 9 See, eg, Kerry Brown et al, ‘Public-Private Partnerships in the Promotion of Sport and Well-Being: A Governance Model’ (Conference Paper, International Research Society for Public Management Conference, 7–9 April 2010) 2.
- 10 Lorenzo Casini, ‘Hybrid Public-Private Bodies within Global Private Regimes: The World Anti-Doping Agency (WADA)’ in Sabino Cassese et al (eds), *Global Administrative Law: Cases, Materials, Issues* (Institute for International Law and Justice, 2<sup>nd</sup> ed, 2008) 37, 39.

significant social and cultural capital that they have been able to transform into power which they have deployed to enlist and coopt the resources of nation-states in support of their sporting endeavours. This has seen nation-states share (some might say cede) significant authority and sovereignty over sports matters to international bodies such as the IOC, FIFA, CAS, and WADA. Importantly, it also has seen nation-states effectively delegate (some might say abdicate) protection of their citizens' rights to these quasi-commercial, non-government bodies.

The purpose of this article is to examine international sports' evolving international global regulatory and legal order. The article explicitly takes the perspective of regulatory scholarship,<sup>11</sup> rather than traditional doctrinal sports law. In doing so, we agree with Duval, who argued 'that the regulation of sport by transnational private institutions should be one of the focal points of transnational lawyers'.<sup>12</sup> However, we are not suggesting that the regulatory perspective should replace the strict sports law frame, but simply that, as Duval stated, 'it is an acknowledgment of the complexity and fluidity of law in the transnational era' as well as reflecting the reality that public and private institutions have been part of a 'progressive shift [globally] "from pyramids to networks"'.<sup>13</sup>

So, how might we characterise the perspective of regulatory scholarship? The very idea of regulation has been contested and rethought over the past three decades with profound implications. Regulation nowadays is a far broader matter than a legal concept emanating from the legislative processes of Parliament. It is a more fluid behavioural construct defined as focused attempts at controlling the behaviour of others, whether by government, civil society and/or industry.<sup>14</sup> As a result, '[t]he traditional "command and control" concept of regulation has ... been broadened to include instruments and activities that extend well beyond the law' and well beyond the nation-state.<sup>15</sup> It encompasses a wide range of regulatory mechanisms and tools ranging from government Acts and Regulations through to codes, guidelines, standards, contracts, grants, economic incentives, information usage, markets, licences and accreditation schemes.<sup>16</sup> As can be seen, black letter law is just one of these options. As Hodge explains:

- 11 See Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1; John Braithwaite, Cary Coglianese and David Levi-Faur, 'Can Regulation and Governance Make a Difference?' (2007) 1(1) *Regulation and Governance* 1; John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar, 2008); Colin Scott, 'Regulating Everything' (Inaugural Lecture, UCD Geary Institute Discussion Paper Series, 26 February 2008); Arie Freiberg, *Regulation in Australia* (Federation Press, 2017); Eric L Windholz, *Governing through Regulation: Public Policy, Regulation and the Law* (Routledge, 2018).
- 12 Antoine Duval, 'Lex Sportiva: A Playground for Transnational Law' (2013) 19(6) *European Law Journal* 822, 824–5.
- 13 Ibid 824.
- 14 Black, 'Critical Reflections on Regulation' (n 11) 26.
- 15 Graeme Hodge, 'Public Policy and Administration in an Era of Regulatory Capitalism' in Thomas R Klassen, Denita Cepiku and TJ Lah (eds), *The Routledge Handbook of Global Public Policy and Administration* (Routledge, 2017) 15, 16; Freiberg, *Regulation in Australia* (n 11) 84.
- 16 Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 85.

Regulatory scholars ... tend to look ‘outside the court room’ and observe attempts to control, order or influence the behaviour of others. They understand that law also functions to facilitate private arrangements and government functions, settle disputes, and in addition expresses our shared values. They tend not to focus on legal doctrine and the text of legislative instruments, but instead debate how regulatory systems can be best designed, what tools and mechanisms work most effectively in responding to particular circumstances, and the degree to which citizens and other stakeholders see regimes as having legitimacy and credibility.<sup>17</sup>

### Regulatory scholarship recognises that society

today is both more diverse and increasingly complex, with [legal and] regulatory functions being undertaken by a variety of different actors (public and private; state and non-state) across multiple sites (local, national and international) and through a variety of different mechanisms (rule based and non-rule based).<sup>18</sup>

Emblematic of this change has been the emergence of networked, polycentric and hybrid legal and regulatory regimes, of which international sports’ transnational private regulatory regimes are excellent examples.<sup>19</sup> Regulatory scholarship also recognises that these regimes often are highly contested and political in nature, involving balancing and sometimes trading off different stakeholder interests, values and perspectives.<sup>20</sup> Importantly for our purposes, regulatory scholarship provides a rich literature that is highly relevant to understanding the dual dynamics of contestation and conflict, and cooperation and compliance, inherent in these transnational private regulatory regimes.<sup>21</sup> To date, however, there have been comparatively few attempts by regulation researchers on the one hand, or international sport law researchers on the other, to apply regulatory scholarship’s understandings of regulatory networks and transnational regulatory regimes to the broader phenomenon of regulating international sports. We suspect that there is much they can learn from each other. This paper aims to make a contribution to this end.

Adopting this regulatory approach, this article focuses its inquiry through two particular analytical lenses; that of PPP, and that of power. As noted above, the

17 Hodge, ‘Public Policy and Administration in an Era of Regulatory Capitalism’ (n 15) 44 (citations omitted).

18 Windholz, *Governing through Regulation: Public Policy, Regulation and the Law* (n 11) 27.

19 See, eg, Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2 *Regulation and Governance* 137 (‘Constructing and Contesting Legitimacy’); David Levi-Faur, ‘Regulation and Regulatory Governance’ in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 3, 5, 7.

20 Eric Windholz and Graeme A Hodge, ‘Conceptualising Social and Economic Regulation: Implications for Modern Regulators and Regulatory Activity’ (2012) 38(2) *Monash University Law Review* 212, 234; Black, ‘Critical Reflections on Regulation’ (n 11) 28.

21 See, eg, Fabrizio Cafaggi, ‘New Foundations of Transnational Private Regulation’ (2011) 38(1) *Journal of Law and Society* 20; Colin Scott, Fabrizio Cafaggi and Linda Senden, ‘The Conceptual and Constitutional Challenge of Transnational Private Regulation’ (2011) 38(1) *Journal of Law and Society* 1.

use of the PPP label is not new to sport. However, its use in the sporting context has tended to be more descriptive than analytical. Nor has it been applied to international sports' governing, regulatory and law-making functions as a whole. This article aims to correct this by viewing international sports regulation as a PPP and by examining the underlying power dynamics of the partnership. This article therefore also seeks to better understand the use by international sporting organisations of their power in shaping those PPPs. Employing Fuchs' 'three faces of power' framework of instrumental, structural and discursive power,<sup>22</sup> this article examines the nature of international sporting organisations' power, and how they have deployed that power to enlist the public sector to assist them to achieve their objectives.

Examining international sports regulation as an exercise in partnership and through the lens of power offers the prospect of fresh perspectives and insights to enhance our understanding of international sports regulation. It may also hold the possibility of lessons for policy projects such as environmental and human rights protection whose global regulatory orders are yet to achieve the level of coverage, cohesion and compliance enjoyed by international sport.

This article proceeds in four parts. Part II introduces the two analytical lenses through which international sports regulation is to be examined: PPPs and power. Part III then introduces the reader to the IOC and FIFA, the article's primary cases studies. Their key features are identified, and points of intersection with national governments are examined. Part IV then distills insights, lessons and implications from conceptualising international sports regulation through the lenses of PPPs and power. The article then concludes in Part V with some thoughts as to how international sporting PPPs may evolve in the future.

## II OUR ANALYTICAL LENSES: PPPS AND POWER

### A PPP

The first lens through which we will be examining international sports regulation is PPP. So, what is a PPP? PPP is a popular idea in contemporary political circles and an increasingly important policy concept employed by governments around the world. It is, however, an extremely broad notion. PPP has long been described as both a governing mechanism and a language game<sup>23</sup> but more recent scholarship has viewed PPP even more broadly still. It has over time 'becoming increasingly apparent that, like democracy or art, PPP [i]s' at its heart "'an essentially contested

22 Doris Fuchs, *Business Power in Global Governance* (Lynne Rienner Publishers, 2007) 56–70. See also Doris Fuchs and Markus ML Lederer, 'The Power of Business' (2007) 9(3) *Business and Politics* 1, 4–11.

23 Graeme A Hodge and Carsten Greve, 'Public-Private Partnerships: An International Performance Review' (2007) 67(3) *Public Administration Review* 545, 546 ('Public-Private Partnerships').

notion”, borrowing from the philosopher Gallie.<sup>24</sup> It is a phenomenon where we can all quickly agree it is desirable in a philosophical or ideal sense, but where we all also have very different opinions as to what the local conception should be. We can all agree on the desirability to marry together the best of both the public and private sectors, but the reality is that PPP is many things to many people and it incorporates a breadth of meanings.

Not everyone accepts the existence of PPP or the usefulness of the PPP idea. Bozeman, for example, argues that all organisations are public,<sup>25</sup> and Marsilio, Cappellaro and Cuccurullo conclude after their large bibliometric survey that ‘there is no core PPP concept’.<sup>26</sup> Hodge observes the multitude of arrangements being labelled PPPs and acknowledges similarly that in a scientific sense ‘there is no such thing as “the PPP model”’.<sup>27</sup> Others also argue that employing the PPP label produces classes so big as not to be useful. Donahue and Zeckhauser, for instance, refuse to use the phrase PPP, warning it is a ‘conceptual swamp’ covering ‘a perniciously broad category’ of arrangements and relationships.<sup>28</sup>

That the PPP label has been applied to many different arrangements and relationships is definitely true. But this does not mean that it is not without meaning or utility as an analytical lens. At its broadest level, PPPs refer to the formation of cooperative arrangements between public and private actors to fulfil a policy function.<sup>29</sup> This broad definition clearly captures a multitude of arrangements and relationships.<sup>30</sup> PPPs can range from the joint making and implementation of rules and norms, to the joint development and provision of goods, services and infrastructure. PPPs also can be thought of as existing on a continuum from mostly public at one end to mostly private at the other end, and

24 See Graeme Hodge, Carsten Greve and Mhamed Biygautane, ‘Do PPP’s work? What and How Have We Been Learning So Far?’ (2018) 20(8) *Public Management Review* 1105, 1108 (citations omitted), citing WB Gallie, ‘Essentially Contested Concepts’ (1956) 56(1) *Proceedings of the Aristotelian Society* 167.

25 Barry Bozeman, *All Organizations Are Public: Bridging Public and Private Organizational Theories* (Jossey-Bass Publishers, 1987).

26 Marta Marsilio, Giulia Cappellaro and Corrado Cuccurullo, ‘The Intellectual Structure of Research into PPPs’ (2011) 13(6) *Public Management Review* 763, 776.

27 Graeme Hodge, ‘Public-Private Partnership: Ambiguous, Complex, Evolving and Successful’ (Conference Paper, International Conference on Applied Research in Economics (iCare-2), 21–4 September 2014) 6.

28 John D Donahue and Richard J Zeckhauser, *Collaborative Governance: Private Roles for Public Goals in Turbulent Times* (Princeton University Press, 2011) 256. See also Wettenhall (n 7) who takes a similar line and prefers to use the term ‘public-private mix’ rather than partnership: at 37; Antonio Vives, Juan Benavides and Angela Marcarino Paris, ‘Selecting Infrastructure Delivery Modalities: No Time for Ideology or Semantics’ (2010) 136(4) *Journal of Construction Engineering and Management* 412, who argue that since almost all public infrastructure projects involve the public and private sectors in one way or another, ‘[a]ll projects are therefore a public-private partnership’: at 412.

29 Stephen H Linder and Pauline Vaillancourt Rosenau, ‘Mapping the Terrain of the Public-Private Policy Partnership’ in Pauline Vaillancourt Rosenau (ed), *Public-Private Policy Partnerships* (MIT Press, 2000) 1, 1.

30 See Hodge and Greve, ‘Public-Private Partnerships’ (n 23). Weihe also gives an alternative set of PPP ‘approaches’ including: local regeneration, policy, infrastructure, governance and development: Guri Weihe, ‘Public-Private Partnerships: Addressing a Nebulous Concept’ (Working Paper No 16, International Center for Business and Politics, Copenhagen Business School, 2005).

everything in between.<sup>31</sup> And nor should the ‘private’ part of the equation be considered homogeneous. ‘Private’ encompasses all bodies that are outside the realm of government, and thus include the private (for profit) sector, the private (not-for-profit) sector and the non-government civil society sector. Thus, the PPP label has been used to describe an extraordinarily diverse range of successful public sector initiatives. These include, for example: institutional cooperation for joint production and risk sharing;<sup>32</sup> long-term infrastructure contracts for the development of road, rail and the like;<sup>33</sup> shorter-term infrastructure projects such as are associated with urban renewal and local economic development;<sup>34</sup> public policy networks in which loose stakeholder relationships are emphasised;<sup>35</sup> contracting out of human services such as for health, welfare and job training;<sup>36</sup> and community development with civil society in which partnership symbolism is adopted for cultural change.<sup>37</sup>

Relevantly for our purposes, PPPs also have been applied to transnational legal, regulatory and governance arrangements. Börzel and Risse, for example, identify five distinct types of transnational PPPs:<sup>38</sup>

1. cooptation where the state consults private actors on and/or incorporates them into the negotiation of international regimes;<sup>39</sup>
2. delegation where international regimes, states or international organisations delegate certain functions to private actors;<sup>40</sup>

31 See, eg, the continuum of PPPs employed by Tanja A Börzel and Thomas Risse, ‘Public-Private Partnerships: Effective and Legitimate Tools of Transnational Governance?’ in Edgar Grande and Louis W Pauly (eds), *Complex Sovereignty: Reconstituting Political Authority in the Twenty-First Century* (University of Toronto Press, 2005) 195, 200.

32 An example of this institutional emphasis is the Rotterdam Port Authority: see Hans van Ham and Joop Koppenjan, ‘Building Public-Private Partnerships: Assessing and Managing Risks in Port Development’ (2001) 3(4) *Public Management Review* 593, 594.

33 See, eg, Sanford V Berg, Michael G Pollitt and Masatsugu Tsuji (eds), *Private Initiatives in Infrastructure: Priorities, Incentives and Performance* (Edward Elgar, 2002); Abby Ghobadian et al (eds), *Public-Private Partnerships: Policy and Experience* (Palgrave Macmillan, 2004); Darrin Grimsey and Mervyn K Lewis, *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance* (Edward Elgar, 2004).

34 See Tony Bovaird, ‘Public-Private Partnerships in Western Europe and the US: New Growths from Old Roots’ in Abby Ghobadian et al (eds), *Public-Private Partnerships: Policy and Experience* (Palgrave Macmillan, 2004) 221; Stephen P Osborne (ed), *Public-Private Partnerships: Theory and Practice in International Perspective* (Routledge, 2000).

35 See Pauline Vaillancourt Rosenau (ed), *Public-Private Policy Partnerships* (MIT Press, 2000).

36 See Graeme Martin, Martin Reddington and Heather Alexander (eds), *Technology, Outsourcing and Transforming HR* (Elsevier, 2008).

37 See Osborne (n 34).

38 Börzel and Risse (n 31) 199–206. See also Benedicte Bull, ‘The Global Elite, Public-Private Partnerships, and Multilateral Governance’ in Jeniffer Clapp and Rorden Wilkinson (eds), *Global Governance, Poverty and Inequality* (Routledge, 2010) 209, 218–26.

39 Börzel and Risse (n 31) give as examples the role played by multinational corporations and international non-government organisations in the economic negotiations of the International Monetary Fund, World Bank and World Trade Organization: at 199–201.

40 Börzel and Risse give as examples the development of technical standards by bodies such as the International Organization for Standardization and the European Committee for Standardization: *ibid* 201–2.

3. co-regulation where private actors participate as partners in international rule making and implementation;<sup>41</sup>
4. private self-regulation induced by the threat of formal regulation, which they refer to as self-regulation in the shadow of hierarchy;<sup>42</sup> and
5. state adoption of private regimes developed in the absence of effective international rules and norms.<sup>43</sup>

Börzel and Risse query, however, whether this final type of PPP — state adoption of private regimes — properly qualifies as a PPP because state involvement is ex post the regime's creation.<sup>44</sup>

A consistent feature emerging from the literature is that PPPs are said to increase the capacity to deliver policy promises in the public interest because they marry together the best features of both sectors. Enhanced problem-solving and better service delivery are both promised through democratic public sector decision-making alongside private sector efficiency and expertise. Sophisticated and comprehensive contracts are often the basis for partnerships so that what needs to be delivered is clear and how various risks are to be managed is explicit. The participation of both sectors also promises improved accountability as well as legitimacy. However, PPPs serve more than project delivery and governance functions. As we hinted earlier, PPPs have discursive power. PPPs have the hallmarks of what Pollitt and Hupe refer to as a 'magic concept' of government — a term that is broad and flexible, has strong positive connotations and normative attractiveness, and a seeming ability to dilute and obscure traditional differences and resolve conflicting interests.<sup>45</sup> PPPs evoke images of positive collaboration and cooperation — and who does not want the best of both sectors through stronger collaboration and cooperation? It is a concept which conveys the impression of a maturing polity in which governments and the private sector cooperate in the public interest, thereby contributing to the legitimacy of those governments and the system itself.<sup>46</sup>

Another common feature of PPPs that emerges from the literature is the division

41 Börzel and Risse give as an example the tripartite structure of the International Labor Organization that gives an equal voice to workers, employers and governments: *ibid* 202–3.

42 Börzel and Risse give as an example the development by the international pharmaceutical industry of their first Code of Pharmaceutical Marketing Practices: *ibid* 203.

43 Börzel and Risse give as an example *lex mercatoria moderna* and its subsequent recognition by national courts and its codification into state recognised systems of private arbitration, and state adoption of private internet domain name registration: *ibid* 203–6.

44 *Ibid* 204.

45 Christopher Pollitt and Peter Hupe, 'Talking About Government: The Role of Magic Concepts' (2011) 13(5) *Public Management Review* 641, 643. See also Eric Windholz and Graeme Hodge, 'The Magic of Harmonisation: A Case Study of Occupational Health and Safety in Australia' (2012) 34(2) *Asia Pacific Journal of Public Administration* 137, 139.

46 This is to be contrasted with its sister concept — 'privatisation' — with which it is often associated.

between strategic and operational decision-making. Governments generally take the strategic lead in establishing the partnership. This is because they overwhelmingly relate to issues for which governments are democratically responsible, and which require the government's imprimatur or permission. For example, they may commit to a major new public infrastructure facility such as a roadway or train line and thereby hold the key to future business and investment opportunities. Governments therefore hold a prize which the private sector seeks. The need for this imprimatur or permission is the main source of government power in negotiations over the formation and terms of any PPP. However, government led does not necessarily mean government dominated. PPPs often are a recognition by government that to successfully address the many complex issues for which it is democratically responsible, private sector resources also may be required. Importantly, these resources often include people and money, but they can extend well beyond this to include information, institutional credibility, organisational capacities, and networks. Possession by the private sector of these resources is their main source of negotiating power, and subsequent operational decision-making authority. Information and subject matter expertise in particular, are both difficult for government to replicate, and can enable private sector actors to play a greater (some might say disproportional) role in both shaping and operationalising the PPP.

It is clear from this brief mapping of the PPP terrain that the mixing of public and private endeavours through partnerships is common around the globe. Also clear is the continued international popularity of PPPs, suggesting a strong degree of ongoing success from such arrangements in delivering high profile public projects. Moreover, it is clear that the concept of PPP is relevant to sport. Despite definitional vagaries, it is evident that PPPs seek to achieve something which neither party could have achieved alone. The relative power of each party is one important determinant of a PPP and the manner with which it functions. All else being equal, the more power possessed by the private actor, the greater will be its influence over the shape of the PPP, and the greater its role within it. This makes understanding the nature of a private actor's power all the more important. And it is to this question that the article now turns.

## **B The Three Faces of Power**

'Power' is another 'essentially contested concept' — and another notion that people recognise and intuitively understand but whose proper use (interpretation and application) is disputed and continuously debated.<sup>47</sup> Dahl captured the intuitive meaning of power well when he stated: '*A* has power over *B* to the

47 Gallie (n 24).

extent that he can get *B* to do something that *B* would not otherwise do'.<sup>48</sup> But this broad definition still leaves much room for debate and disagreement. What is the nature of this power? On what basis does it rest? And how is it exercised? Different commentators have advanced different frameworks for answering these questions. Some frameworks emphasise power's social and political dimensions; others its legal and economic dimensions; and others still its cultural dimensions. Some adopt a pluralist view; others a behavioral account; and others still a more radical view focusing on power as domination.<sup>49</sup>

In this article we have chosen to employ Fuchs' 'three faces of power' framework that conceptualises power as having three faces (or types) — instrumental, structural and discursive.<sup>50</sup> Fuchs' framework borrows from and builds upon elements of the other frameworks. Importantly, however, it tailors them to explain the power of global corporations (be they multinational corporations or international non-government organisations), and their use of that power to shape state interests and policies, and the foci and operations of international organisations. As such, it is ideally suited to examining the power of international sporting organisations which, as will be seen, are hybrid creatures with features common to both multinational corporations and international non-government organisations.

## 1 Instrumental Power

Fuch's first face of power is instrumental power. Instrumental power refers to 'the direct influence of an actor on another actor' to achieve a desired end.<sup>51</sup> Direct power generally involves the mobilisation of key resources such as authority, information and knowledge, political influence, or control over money or rewards.<sup>52</sup> Traditionally this has been linked to the use of these resources coercively. More recently, however, it has been extended to soft types of power such as manipulation, positive reinforcement and social conditioning.<sup>53</sup>

In the case of business actors, it has been used to describe their use of lobbying and

48 Robert A Dahl, 'The Concept of Power' (1957) 2(3) *Behavioral Science* 201, 202–3. Weber similarly describes power as the ability of an actor to carry out its own will despite resistance: Max Weber, *The Theory of Social and Economic Organisation*, tr AM Henderson and Talcott Parsons (Free Press, 1964) 152.

49 See, eg, Dahl (n 48); Massimiliano Vatiere, 'Towards a Law & Economics of Power' (PhD Dissertation, University of Siena, 2008); Peter Bachrach and Morton S Baratz, 'Two Faces of Power' (1962) 56(4) *American Political Science Review* 947; Pierre Bourdieu, 'Social Space and Symbolic Power' (1989) 7(1) *Sociological Theory* 14; David Swartz, *Culture and Power: The Sociology of Pierre Bourdieu* (University of Chicago Press, 1997); Steven Lukes, *Power: A Radical View* (Palgrave, 1974).

50 Fuchs (n 22) 52–70. See also Fuchs and Lederer (n 22).

51 Fuchs (n 22) 56.

52 Dahl (n 47) 203–6.

53 See John Kenneth Galbraith, *The Anatomy of Power* (Houghton Mifflin, 1983) 4.

campaign finance activities to influence the political process.<sup>54</sup> Numerous studies point to the vast amounts spent by businesses on lobbying to secure favourable policy settings or to prevent adverse regulation, as evidence of its growing role and importance.<sup>55</sup> Campaign finance activities, in particular, have proven to be an important instrument of political power. It is an arena in which businesses enjoy a resource advantage over civil society actors,<sup>56</sup> and an instrument that provides business actors with privileged access to policy and political decision-makers. This access, in turn, enables business actors to build relationships with decision-makers that enable them to influence their decision-making. Access also enables them to demonstrate their knowledge and expertise. This knowledge and expertise (and the ‘information asymmetry’ it creates) arguably is one of their greatest sources of power, it being the most difficult for governments to replicate. And in the case of transnational corporations, they are able to deploy and leverage their expertise and resources across multiple jurisdictions, enabling them to influence regulatory agendas at both the national and global level.<sup>57</sup>

In summary, instrumental power enables an actor to coopt national governments to act in their interests. As such, it also is an example of private interest capture theories of regulation — where regulation is supplied to (or captured by) those who value it the most.<sup>58</sup>

## 2 Structural Power

Structural power is a function of the structures and processes through which both direct and indirect decision-making power is distributed and exercised. Much of the early literature on structural power focused on its role in agenda-setting, and on one actor’s ability to determine which issues or other actors are (or are not) considered by policy and political processes.<sup>59</sup> In the case of business actors, this was closely tied to their ability to physically move their businesses and investments to reward (or punish) states with favourable (or unfavourable) investment conditions.<sup>60</sup> A number of studies, for example, have ‘emphasized the

54 See generally Fuchs (n 22) 56–7; Fuchs and Lederer (n 22) 4–5; John Mikler, *The Political Power of Global Corporations* (Polity Press, 2018) 35–40.

55 See, eg, the studies cited by Mikler with respect to the amounts spent by business post-Global Financial Crisis to prevent or influence the shape of regulatory reform: Mikler (n 54). Mikler also cites numerous examples of corporations effectively using lobbying and campaign finance activities to influence both domestic and international policy settings: at 36–40.

56 See generally Richard A Higgott, Geoffrey RD Underhill and Andreas Bieler (eds), *Non-State Actors and Authority in the Global System* (Routledge, 2000).

57 See generally Fuchs and Lederer (n 22) 4–5; Mikler (n 54) 35–40.

58 Richard A Posner, ‘Theories of Economic Regulation’ (1974) 5(2) *Bell Journal of Economics and Management Science* 335, 344. See also George J Stigler, ‘The Theory of Economic Regulation’ (1971) 2(1) *Bell Journal of Economics and Management Science* 3; Sam Peltzman, ‘Towards a More General Theory of Regulation’ (1976) 19(2) *Journal of Law and Economics* 211; Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Cambridge University Press, 2014).

59 Bachrach and Baratz (n 49).

60 Mikler (n 54) 41.

bargaining power of corporations — promising jobs and income — on the policy agendas of host governments'.<sup>61</sup> It also is an example of structural power being used instrumentally — highlighting the overlap of the two powers.

More recently, structural approaches to power have broadened to consider how 'positions in ... structures and ... networks may ... endow actors with direct rule-setting power'.<sup>62</sup> As Fuchs and Lederer observe, in today's globalised world 'economic and organizational structures, processes, and interdependencies mean that actors in control of pivotal networks and resources have the capacity to adopt, implement, and enforce rules affecting the general public'.<sup>63</sup> It also can confer on them 'the power to shape and determine the structures of the global political economy' within which nation-states and other actors have to operate.<sup>64</sup> Self-regulation, co-regulation and PPPs often are the product of the exercise of this power. In recent years we have witnessed a significant increase in decentred, networked and polycentric governance and regulatory institutions in which business actors play an important rule-making and standard-setting role. Examples include the Internet Corporation for Assigned Names and Numbers, the International Air Transport Association and the International Organization for Standardization.<sup>65</sup>

Both agenda-setting and rule-making capacity requires control of processes and resources,<sup>66</sup> which places business actors in an advantaged position compared to civil society actors. Moreover, it means that those who control those processes and resources are 'no longer dependent clients of their home states' but, rather, capable of forging new global partnerships in which they share economic and regulatory governance with nation-states through collaborative transnational networks.<sup>67</sup>

### 3 *Discursive Power (and Legitimacy)*

Discursive power focuses on one actor's ability to influence and shape the perceptions, preferences and interests of another actor in such a way that certain social, political or economic orders are considered normal, and alternatives

61 Fuchs and Lederer (n 22) 6, citing Robert W Cox, *Production, Power, and World Order: Social Forces in the Making of History* (Columbia University Press, 1987) vol 1, Andre Gunder Frank, *Dependent Accumulation and Underdevelopment* (Macmillan Press 1978) and Immanuel Wallerstein, *The Capitalist World-Economy* (Cambridge University Press, 1979).

62 Fuchs and Lederer (n 22) 7.

63 Ibid.

64 Susan Strange, *States and Markets* (Pinter Publishers, 1988) 24. Fuchs and Lederer argue that shaping structures is not the exercise of structural power but an output from the exercise of instrumental and discursive power: *ibid* 6.

65 See generally Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press, 2011).

66 Mikler (n 54) 40.

67 Stephen Wilks, *The Political Power of the Business Corporation* (Edward Elgar, 2013) 166.

unimaginable.<sup>68</sup> Discursive power generally is exercised through the dissemination of truths, myths and symbolic imagery.<sup>69</sup> As such, discursive power is a function of communicative practices and cultural values. It shapes perceptions, and the framing of issues, policies, actors and processes.<sup>70</sup> It also can influence and shape broader societal norms and ideas, and what the public focuses upon and desires.<sup>71</sup> Of most relevance to our analysis is the manner with which discursive power can enable an actor to project its private interests as being synonymous with the public interest.<sup>72</sup> The most commonly cited example of this is business' use of corporate social responsibility to 'portray themselves as agents of societal responsibility rather than just profitability'.<sup>73</sup> While discursive power is the least tangible of the three faces of power, it arguably is the most powerful. As Lowi observed, 'whoever sets the terms of discourse will almost always determine the outcome'.<sup>74</sup>

Discursive power is closely tied to legitimacy — the authority that comes from being perceived as acceptable and credible.<sup>75</sup> Legitimacy is an important concept. A growing body of research establishes that 'legitimacy is an effective influence strategy' that creates a sense of obligation facilitating compliance,<sup>76</sup> and that legitimacy provides a 'reservoir of favorable attitudes or good will' that provides support in times of crisis and instability.<sup>77</sup> Majone goes so far as to suggest that legitimacy has replaced coercive power as the essential resource of policy makers.<sup>78</sup> However, legitimacy is also multi-dimensional and complex. Windholz recently distilled its many dimensions into four domains: legal; normative;

68 Lukes (n 49) 23–4.

69 Bourdieu (n 49) 14.

70 Fuchs and Lederer (n 22) 8.

71 Ibid 8–11.

72 David L Levy and Peter J Newell, 'Business Strategy and International Environmental Governance: Toward a Neo-Gramscian Synthesis' (2002) 2(4) *Global Environmental Politics* 84, 87, quoted in Mikler (n 54) 45.

73 Mikler (n 54) 47.

74 Theodore J Lowi, 'Our Millennium: Political Science Confronts the Global Corporate Economy' (2001) 2(2) *International Political Science Review* 131, 131.

75 Central to dictionary definitions of 'legitimacy' are notions of acceptability and credibility and of actions that are proper and justifiable by reference to accepted rules, principles or standards: see, eg, *Oxford English Dictionary* (online at 28 July 2019) 'legitimacy' (def 1); *Macquarie Dictionary* (4th ed, 2005) 'legitimate' (def 2); *The Oxford Thesaurus* (2nd ed, 1997) 'legitimate' (def 1). Suchman (in one of the more frequently cited definitions) defines legitimacy as 'a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions': Mark C Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) *Academy of Management Review* 571, 574.

76 Tom R Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 *Annual Review of Psychology* 371, 392. See also Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2nd ed, 2006); Donal Casey and Colin Scott, 'The Crystallization of Regulatory Norms' (2011) 38(1) *Journal of Law and Society* 76.

77 David Easton, *A Systems Analysis of Political Life* (Wiley, 1965) 273. See also Suchman (n 75) 596–7.

78 Giandomenico Majone (ed), *Regulating Europe* (Routledge, 1996) 4; Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17(2) *Journal of Public Policy* 139, 161.

pragmatic; and cognitive.<sup>79</sup> Legal legitimacy refers to institutions, processes and actions being acceptable and credible because they are authorised through democratic processes and operate with the sanction of the state.<sup>80</sup> Normative legitimacy, on the other hand, reflects a perception that institutions, processes and actions are acceptable and credible when evaluated against a normative set of criteria important and relevant to the people making the assessment. These criteria can include effectiveness and efficiency; fairness and consistency; accountability and transparency; and independence and expertise.<sup>81</sup> Pragmatic legitimacy refers to acceptance of institutions, processes and actions because they produce policies and outcomes aligned to one's self-interest and cognitive legitimacy exists when the institutions, processes and actions are so deeply rooted in prevailing economic, social and cultural models that they are taken for granted and barely questioned.<sup>82</sup> Of these, Suchman argues that cognitive legitimacy is the most powerful as it tends to render alternatives impossible.<sup>83</sup> As Mikler observes, cognitive legitimacy enables actors to “manufacture” consent on the basis of “common sense” to produce what Galbraith termed “the conventional wisdom”.<sup>84</sup> Black similarly suggests that while cognitive legitimacy is perhaps the subtlest form of legitimacy, it also is the most resilient.<sup>85</sup>

So, how do the theoretical ideas of partnership and of power inform the regulation of sport at the global level? To answer this question, we first need to set out the global regulatory order which exists for sport. It is to this matter that we now turn.

### III SPORTS' GLOBAL LEGAL AND REGULATORY ORDERS

In this Part we explore sports' global legal and regulatory order. We commence by introducing our two case studies, the IOC and FIFA, and explaining who they are and what they broadly do, namely create, promote and regulate sporting events — and prizes of great value. Next we examine the key mechanisms through which they do these things. We have grouped these mechanisms under two broad headings — autonomous mechanisms and partnering mechanisms — reflecting

79 Windholz, *Governing through Regulation: Public Policy, Regulation and the Law* (n 11) 117–18. Those familiar with legitimacy theory will observe these domains build in particular upon the earlier work of Suchman (n 70).

80 Windholz, *Governing through Regulation: Public Policy, Regulations and the Law* (n 11) 113–14.

81 *Ibid* 114–15.

82 *Ibid* 116.

83 Suchman (n 75) 583.

84 Mikler (n 54) 46 (citations omitted), citing Arun K Patnaik, 'Gramsci's Concept of Common Sense: Towards a Theory of Subaltern Consciousness in Hegemony Processes' (1988) 23(5) *Economic and Political Weekly* 2 and John Kenneth Galbraith, *The Affluent Society* (Hamish Hamilton, 1958). See also Steven Bernstein and Benjamin Cashore, 'Can Non-State Global Governance Be Legitimate? An Analytical Framework' (2007) 1 *Regulation and Governance* 347; Benjamin Cashore, 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority' (2002) 15(4) *Governance* 503.

85 Black, 'Constructing and Contesting Legitimacy' (n 19) 145.

the somewhat bipolar nature of sporting organisations' relationships with nation-states.

## A IOC and FIFA: Creators, Promoters, Regulators

Of all international sporting organisations, none have greater presence than the first two truly global organisations, the IOC and FIFA. Established in 1894, the IOC is responsible for organising the modern Olympic Games.<sup>86</sup> FIFA, created 10 years later in 1904, is the international governing body of association football.<sup>87</sup> And while these organisations tend to dwarf other international sporting organisations in terms of size (principally participation and revenue), they nevertheless provide excellent case studies — with most other international sporting organisations basing themselves and their governance structures on the examples provided by these organisations.

Both the IOC and FIFA broadly do three things. First, they create and nurture prizes of immense economic, social, cultural and political value. In the case of the IOC, that prize is the Olympic Games, and the medals awarded at them. In the case of FIFA, it is football's major international tournaments, notably the mens' and womens' World Cups. In 2017, the brand value of the Summer Olympic Games was estimated to be worth USD419 million, the Winter Olympic Games USD285 million, and FIFA's World Cup USD229 million.<sup>88</sup> However, their value extends far beyond the economic. The Olympics' values are universal: friendship, respect, excellence, determination, inspiration, courage and equality.<sup>89</sup> To discuss the Olympics is to create images of hope and optimism; dreams and inspiration; friendship and fair play; and joy in effort.<sup>90</sup> Similar values, attributes and imagery attach to FIFA's World Cups.<sup>91</sup> These are all qualities to which we as individuals, as well as corporate sponsors and nation-states, aspire. Politically, governments use sport to obtain increased status and prestige externally, and pride and cohesion internally. Thus we have seen ideologically driven nations use the Olympic Games to demonstrate their power and superiority (eg, Soviet Bloc countries during the Cold War); dictatorships use them to gain international goodwill and a seat at the global table of nations (eg, African nations during the 1970s); and

86 See 'Who We Are', *The International Olympic Committee* (Web Page) <[www.olympic.org/about-ioc-olympic-movement](http://www.olympic.org/about-ioc-olympic-movement)> ('Who We Are').

87 See 'History of Football: The Global Growth', *FIFA* (Web Page) <[www.fifa.com/about-fifa/who-we-are/the-game/global-growth.html](http://www.fifa.com/about-fifa/who-we-are/the-game/global-growth.html)>.

88 'Most Valuable Sport Event Brands Worldwide in 2017 (in Million U.S. Dollars)', *Statista* (Web Page, October 2017) <[www.statista.com/statistics/253353/brand-value-of-sport-events-worldwide/](http://www.statista.com/statistics/253353/brand-value-of-sport-events-worldwide/)>.

89 These are a combination of the values of the Olympics and Paralympics: *The International Olympic Committee*, 'Who We Are' (n 86); 'What Are the Paralympic Values?', *Paralympic* (Web Page, 28 July 2014) <[www.paralympic.org/feature/what-are-paralympic-values](http://www.paralympic.org/feature/what-are-paralympic-values)>.

90 'The Value and Equity of the Olympic Brand', *Michael R Payne* (Web Page, 2012) <[michaelrpayne.com/article\\_fortune\\_2.html](http://michaelrpayne.com/article_fortune_2.html)>.

91 'What Living Football Means', *FIFA* (Web Page) <[www.fifa.com/livingfootball](http://www.fifa.com/livingfootball)>.

more recently, emerging economies use both the Olympics and World Cup to project themselves onto the global stage (eg, the BRIC countries have each hosted one of these events in the past 10 years).<sup>92</sup> Investing in sport and sporting success also is a way to develop national pride and social capital. Recently we have seen western nations invest heavily to achieve national success on the international stage, Great Britain's national sports lottery being an excellent example.<sup>93</sup>

Second, both organisations promote sport and the sporting ideal globally. Over time this ideal has expanded from the purity of sport and the fairness of competition to encompass broader societal values. Today they include spirit of unity, solidarity, peace, understanding, and fair play, without any discrimination on the part of politics, race, religion, gender, or any other reason.<sup>94</sup> Moreover, both the IOC and FIFA have developed comprehensive programs to advance their sports and the sporting ideal. In the case of the IOC, it has developed an ambitious strategy known as 'Olympic Agenda 2020' to grow and protect the uniqueness of the Olympic Games, and to strengthen Olympic values in society.<sup>95</sup> In furtherance of this plan, the IOC has committed to distribute more than 90% of its income to the wider sporting movement, thereby helping athletes and sporting organisations at all levels around the world.<sup>96</sup> FIFA's vision is 'to promote the game of football, protect its integrity and bring the game to all'.<sup>97</sup> In this regard, FIFA also has set itself ambitious targets including that 60% of the world's population will participate in football — either as a player, coach, referee or spectator.<sup>98</sup> To achieve this, FIFA has committed to provide each of its member associations with USD1.25 million per annum through 2015–18,<sup>99</sup> a total investment of USD1.05 billion into football over the four year period. Through these investments, not only do the IOC and FIFA grow the sports for which they are responsible, they also establish themselves in the minds of the public as the custodians of those sports and ideals with which they are associated, thereby creating a valuable reservoir of discursive power.

92 Lincoln Allison and Terry Monnington, 'Sport, Prestige and International Relations' in Lincoln Allison (ed), *The Global Politics of Sport: The Role of Global Institutions in Sport* (Routledge, 2005) 5.

93 'The National Lottery', *UK Sport* (Web Page) <[www.uk sport.gov.uk/about-us/partners/the-national-lottery](http://www.uk sport.gov.uk/about-us/partners/the-national-lottery)>.

94 See, eg, the Olympic values and ideals encompassed in the concept of Olympism: 'Promote Olympism in Society', *The International Olympic Committee* (Web Page, 2019) <[www.olympic.org/the-ioc/promote-olympism](http://www.olympic.org/the-ioc/promote-olympism)>; 'Make the World a Better Place', *FIFA* (Web Document, 2005) <[www.fifa.com/mm/document/afprograms/worldwideprograms/fifa\\_ffh\\_en\\_1851.pdf](http://www.fifa.com/mm/document/afprograms/worldwideprograms/fifa_ffh_en_1851.pdf)>.

95 'Olympic Agenda 2020', *The International Olympic Committee* (Web Page, 2019) <<https://www.olympic.org/olympic-agenda-2020>>.

96 'Olympic Agenda 2020: Strategic Roadmap for the Future of the Olympic Movement Unveiled', *News* (Web Page, 18 November 2014) <[www.olympic.org/news/olympic-agenda-2020-strategic-roadmap-for-the-future-of-the-olympic-movement-unveiled](http://www.olympic.org/news/olympic-agenda-2020-strategic-roadmap-for-the-future-of-the-olympic-movement-unveiled)>.

97 'FIFA 2.0: The Vision for the Future', *FIFA* (Web Document, 13 October 2016) 16 <[resources.fifa.com/mm/document/affederation/generic/02/84/35/01/FIFA\\_2.0\\_Vision\\_LOW\\_neu.17102016\\_Neutral.pdf](http://resources.fifa.com/mm/document/affederation/generic/02/84/35/01/FIFA_2.0_Vision_LOW_neu.17102016_Neutral.pdf)>.

98 *Ibid.*

99 *Ibid.* 32.

And third, having created the prize and nurtured the sporting ideal, each of the IOC and FIFA has developed a comprehensive global regulatory regime through which they control every important aspect of the competitions for them. Space does not permit a forensic analysis of all its elements, or indeed any of them. Nor is this the purpose of this article. Rather, this article focusses on describing key elements illustrative of their regimes' relationships with nation-states. These key elements are discussed in the sub-sections that follow. At this stage, two overarching features warrant mention. First is the detailed set of rules each organisation has developed. As noted in the Introduction, these rules determine which countries and athletes may compete in their competitions, when and where, as well as the manner with which they (and other officials) must conduct themselves. These rules cover a broad range of topics and include player eligibility and transfer rules, anti-doping codes, complaints, investigation and disciplinary guidelines, illicit drugs, gambling, respect and responsibility, and vilification and discrimination policies.<sup>100</sup> Second is the manner with which these rules are imposed and enforced. Each of the IOC and FIFA head a sophisticated network of member and affiliated organisations that work cooperatively and collaboratively to achieve collective goals. 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, of which FIFA is one. And in the case of FIFA (and other international sports federations), its members are the national sports federations that administer, organise and supervise their sports at a country level. Through a series of cascading contracts, compliance with the IOC's and FIFA's statutes, regulations, directives and decisions is passed down to their member and affiliate organisations, and from them 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.

Up to now, we have described the IOC's and FIFA's global regulatory order without reference to the role played by the state. In the next two sub-sections we turn to discuss that role, first by reference to international sporting organisations' desire to remain autonomous and independent from governments, and second by reference to their need to partner with them.

## **B IOC and FIFA: Autonomous and Independent**

Autonomy and independence from government interference are fundamental principles of both the IOC and FIFA. For example, the Fundamental Principles of

100 International Olympic Committee, *Olympic Charter* (at 9 October 2018) ('*Olympic Charter*'); FIFA, *FIFA Statutes* (at August 2018) ('*FIFA Statutes*').

Olympism in the *Olympic Charter* states:

Recognising that sport occurs within the framework of society, sports organisations within the Olympic Movement shall apply political neutrality. They have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organisations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied.<sup>101</sup>

Autonomy from government also is evident in the membership of the IOC. Its members are natural persons who are representatives of the IOC in their respective countries, and not their country's delegate within the IOC.<sup>102</sup> And the National Olympic Committees and international sporting federations affiliated with it also are required to preserve and maintain their autonomy and independence from 'political, legal, religious or economic pressures which may prevent them from complying with the *Olympic Charter*'.<sup>103</sup> *FIFA Statutes* similarly require that it, its national association members, and any clubs, leagues or any other groups affiliated with its national associations, operate independently and are not influenced by any third parties, including national governments.<sup>104</sup>

However, it is not autonomy without limits. All international sporting organisations are legal entities incorporated pursuant to national laws; in the case of the IOC and FIFA, the laws of Switzerland.<sup>105</sup> They are thus subject to the laws of incorporation of that state, and the general law of the countries in which they operate. It is not with respect to the application of these laws that their concern for autonomy lies, however. Rather, what international sporting organisations are most concerned about is autonomy from political interference, and from laws that specifically target them and their operations. As former IOC President Jacques Rogge stated in 2010:

What does 'autonomy of sport' mean? Let me first say what it does not mean: [i]t does not mean that we are above the law or that we should not be expected to adhere to principles of good governance. It simply means that the world of sport

101 *Olympic Charter* (n 100) 11 [5].

102 *Ibid* r 16.

103 *Ibid* r 27.6. See also *ibid* rr 2.5, 25. Note that this applies only to international and national federations of sports that compete at the Olympic Games. Some large international sports bodies are outside the Olympic Movement, such as the Fédération Internationale de l'Automobile ('FIA') and the International Cricket Council.

104 See *FIFA Statutes* (n 100) arts 14(1)(i), 19(1), 20(2).

105 *Olympic Charter* (n 100) r 15; *FIFA Statutes* (n 100) art 1.1. Switzerland is the preferred domicile of many international sporting organisations, presumably because of the greater degree of secrecy Switzerland affords such organisations. However, there are some notable exceptions. For example, the FIA is incorporated in France; the International Association of Athletics Federations is incorporated in Monaco; the International Tennis Federation is incorporated in the Bahamas; World Rugby is incorporated in Wales; and the International Sailing Federation is incorporated in the United Kingdom.

and sports administration should be free from direct political or government interference. It means that governments should not interfere with fair elections for National Olympic Committees, or seek to force the selection of coaches or athletes. We should be allowed to freely form sports organisations, federations and clubs. We should be allowed to freely determine the rules of sport, and to establish structures and procedures for the practice of sport.<sup>106</sup>

This sentiment was echoed by current IOC President Thomas Bach, who in an address to the 68<sup>th</sup> Session of the United Nations General Assembly stated:

Regardless of where in the world we practise sport, the rules are the same. They are recognised worldwide. They are based on a common ‘global ethic’ of fair play, tolerance and friendship. But to apply this ‘universal law’ worldwide and spread our values globally, sport has to enjoy responsible autonomy. Politics must respect this sporting autonomy. For only then can sport organisations implement these universal values amidst all the differing laws, customs and traditions. Responsible autonomy does not mean sport should operate in a law-free environment. It does mean that we respect national laws which are not targeted against sport and its organisation alone ...<sup>107</sup>

Both the IOC and FIFA are vigilant in guarding this aspect of their autonomy. As noted above, the principal mechanism by which the IOC and FIFA seek to regulate the behaviour of their members and affiliates is contractual. The contracts they enter into require those affiliates and members to comply with — and to ensure their members and affiliates comply with — in the case of the IOC, the *Olympic Charter*, and in the case of FIFA, its statutes — both of which require those organisations to maintain and preserve their autonomy and independence as a condition of membership.<sup>108</sup> 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. For example, since 2007, the IOC has suspended Ghana, Panama and Kuwait for autonomy related issues.<sup>109</sup> And Meier and García identify 24 instances in which FIFA suspended a national association

106 Jacques Rogge, ‘Speech from the IOC President, Jacques Rogge’ (Speech, First World Olympic Sport Convention, 23 October 2010) 2–3, quoted in Louise Reilly, ‘An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes’ [2012] (1) *Journal of Dispute Resolution* 63, 77.

107 Thomas Bach, ‘Building a Peaceful and Better World through Sport and the Olympic Ideal’ (Speech, 68<sup>th</sup> Session of the United Nations General Assembly, 6 November 2013) 3.

108 *Olympic Charter* (n 100) rr 2.5, 25, 27.6, 59; *FIFA Statutes* (n 100) arts 14(1)(i), 17, 19(1), 20(2).

109 Nikki Dryden, ‘When Can the IOC Investigate National Olympic Committees?’, *LawInSport* (Web Page, 23 July 2019) <[www.lawinsport.com/content/articles/item/when-can-the-ioc-investigate-national-olympic-committees](http://www.lawinsport.com/content/articles/item/when-can-the-ioc-investigate-national-olympic-committees)>.

during the period 2003 to 2013, 19 of which were for government interference.<sup>110</sup> Moreover, they report that in all instances, governments backed down and the matter was resolved in line with FIFA's preferred solution — a clear example of the successful use by FIFA of its instrumental (contractual), structural (network) and discursive (guardian of the purity of sport from political and government interference) powers.<sup>111</sup>

Enforcement of these contracts does not take place in national courts. Rather, sports-related disputes that fall under these contracts are heard by CAS. And it is to CAS that the paper now focuses.

## 1 CAS

Established by the IOC in 1983,<sup>112</sup> CAS is not (despite the first word in its name) a court of law. Rather, it is a private international arbitration tribunal based in Lausanne, Switzerland, whose jurisdiction and authority are based on the consent of the parties, and whose awards are dependent for its efficacy upon recognition by national laws and enforcement by national courts.<sup>113</sup> CAS was established to overcome the problem of different national courts reaching inconsistent interpretations of the rules of the IOC, FIFA and affiliated 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.<sup>114</sup> Autonomy, independence and impartiality are central to it successfully discharging this dual role. And it is generally perceived as successful.<sup>115</sup>

Yet it is not a body without its limitations and tensions. First, while in a number of areas CAS has established its own jurisprudence that moves the law beyond the nation-state, this movement is not complete. As noted above, the efficacy of its awards is dependent upon recognition by national laws, and enforcement by

110 Henk Erik Meier and Borja García, 'Protesting Private Transnational Authority against Public Intervention: FIFA's Power over National Governments' (2015) 93(4) *Public Administration* 890, 895–7.

111 See generally *ibid.*

112 'History of the CAS', *Tribunal Arbitral du Sport / Court of Arbitration for Sport* (Web Page) <[www.tas-cas.org/en/general-information/history-of-the-cas.html](http://www.tas-cas.org/en/general-information/history-of-the-cas.html)>.

113 CAS awards are recognised and enforced by national courts pursuant to the United Nations Commission on International Trade Law ('UNCITRAL'): *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959); in Australia pursuant to the *International Arbitration Act 1974* (Cth). See also *Raguz v Sullivan* (2000) 50 NSWLR 236.

114 For an overview of CAS, see, eg, Reilly (n 106); Matthew J 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.

115 See, eg, Richard H McLaren, 'Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror' (2010) 20(2) *Marquette Sports Law Review* 305; Matthew J Mitten and Hayden Opie, "'Sports Law': Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution' (2010) 85(2) *Tulane Law Review* 269, 285–90; Daniel H Yi, 'Turning Medals into Metal: Evaluating the Court of Arbitration of Sport as an International Tribunal' (2006) 6 *Asper Review of International Business and Trade Law* 289, 291.

national courts.<sup>116</sup> And national laws still apply to regulate important aspects of international and national sporting organisations' operations. Thus we have seen competition laws applied to ensure the fairness of player transfer systems,<sup>117</sup> administrative law principles applied to government agencies that assist sport organisations,<sup>118</sup> and national law enforcement agencies take action in response to corrupt conduct.<sup>119</sup> And second, CAS is, on the one hand, an arbitral body established to resolve private commercial disputes as an alternative to national courts; and on the other hand, a body designed to resolve sporting disputes that are public in nature.<sup>120</sup> As such, it is a body that applies private arbitration rules to sporting issues of sometimes great public interest. Viewed in this manner, the system administered by CAS too is a mix of both private and public institutions, goals and objectives. But the tension inherent in this dual role goes further than the private-public divide. It also risks undermining the sovereignty of the nation-state and its ability to ensure that its athlete citizens are protected by its laws. As Mitten and Opie observe:

[T]here is an inherent tension between internationalism (ie, the need for international sports to operate under a consistent, worldwide legal framework), and nationalism (ie, the desire of each nation to preserve its sovereignty and ensure that its athlete citizens are protected by its laws). Olympic and international sports competition requires uniform and generally accepted rules governing on-field competition that are interpreted, applied, and enforced by independent and impartial referees, umpires, or judges whose decisions are final. Similarly, the resolution of disputes arising out of Olympic and international sports competition also requires an off-field legal system pursuant to which an independent international tribunal or court with specialized sports law expertise renders final and binding decisions having global recognition and effect.<sup>121</sup>

116 See discussion in above n 113.

117 See, eg, the application of European Union ('EU') competition law that invalidated aspects of a number of international sporting organisations' player transfer rules: Jack Anderson, *Modern Sports Law: A Textbook* (Hart Publishing, 2010) 321–37; Antoine Duval and Ben Van Rompuy (eds), *The Legacy of Bosman: Revisiting the Relationship Between EU Law and Sport* (Asser Press, 2016).

118 See, eg, the action brought by the Essendon Football Club, its coach and players arguing (ultimately unsuccessfully) that Australia's anti-doping regulator had acted ultra vires its authorising legislation: *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2014) 227 FCR 1 ('*Essendon Football Club*'); *Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2015) 227 FCR 95 ('*Hird*').

119 See, eg, the American and Swiss investigations into corruption at FIFA: Bruce W Bean, 'An Interim Essay on FIFA's World Cup of Corruption: The Desperate Need for International Corporate Governance Standards at FIFA' (2016) 22(2) *ILSA Journal of International and Comparative Law* 367; Matthew B DiCenso, 'A Long-Awaited Reboot: The FIFA Scandal and Its Repercussions for Football's Governing Body' (2017) 40(1) *Boston College International and Comparative Law Review* 115.

120 Nick De Marco, 'The Right to a Fair Hearing in Sports' Cases: Lessons from the ECtHR's Decisions in Mutu & Pechstein', *LawInSport* (Web Page, 15 October 2018) <[www.lawinsport.com/topics/articles/item/the-right-to-a-fair-hearing-in-sports-cases-lessons-from-the-ecthr-s-decision-in-mutu-pechstein](http://www.lawinsport.com/topics/articles/item/the-right-to-a-fair-hearing-in-sports-cases-lessons-from-the-ecthr-s-decision-in-mutu-pechstein)>.

121 Mitten and Opie (n 115) 285.

## C IOC and FIFA: The Need to Partner

Establishing, maintaining and enforcing sports global regulatory and legal order requires money. Both the IOC's and FIFA's primary sources of revenue come from the sale of broadcasting rights to their events and corporate sponsorships.<sup>122</sup> Their revenue stream is not consistent, however. It peaks significantly in the years in which they hold their signature events. It is therefore usual to express their revenues over a four-year period ending with those events. In the case of the IOC, its total revenue over the four-year period 2013–16 (ending with the Rio Olympics) was USD5,160 million,<sup>123</sup> and FIFA's total revenue over the four-year period 2015–18 (ending with the Russia World Cup) was USD5,656 million.<sup>124</sup>

Notwithstanding their size and wealth, however, neither the IOC nor FIFA possess the resources unilaterally to administer their sports on a global scale. As a result, they partner with other organisations. The key actor with which they partner (in addition to broadcasters and corporate sponsors) are nation-states. In the case of the IOC, this is an express part of the *Olympic Charter*. Rule 2.4, for example, directs the IOC to cooperate with competent public authorities.<sup>125</sup> Two of the clearer examples of this partnership is their outsourcing to nation-states of the hosting of their signature events, and the manner with which they cooperate with governments to address the scourge of performance-enhancing drugs.<sup>126</sup>

### 1 Outsourcing of Signature Events

Hosting the Olympic Games or a World Cup is expensive. The average cost of hosting the Summer Olympics from 2000 to 2016 is USD21.18 billion; and the Winter Olympics USD16.4 billion.<sup>127</sup> And the last three World Cups are estimated

122 International Olympic Committee, *Olympic Marketing Fact File: 2019 Edition* (Report, 2019) 6, 8 <stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/IOC-Marketing-and-Broadcasting-General-Files/Olympic-Marketing-Fact-File-2018.pdf#\_ga=2.170749798.752741918.1529469191-1353163804.1496626825> ('*Olympic Marketing Fact File*'); 'Finances', *FIFA* (Web Page) <www.fifa.com/governance/finances/index.html> ('*FIFA Finances*').

123 *Olympic Marketing Fact File* (n 122) 8.

124 '*FIFA Finances*' (n 122).

125 *Olympic Charter* (n 100) r 2.4.

126 Other examples include: state protection of IOC intellectual property: *Nairobi Treaty on the Protection of the Olympic Symbol*, opened for signature 24 October 1981, *WIPO* (entered into force 25 September 1982); the Olympic Truce where the General Assembly of the United Nations 'urges Member States to observe the Olympic Truce from the seventh day before the opening and the seventh day following the closing of each of the Olympic Games': *Observance of the Olympic Truce*, GA Res 48/11, UN Doc A/RES/48/11 (2 November 1993, adopted 25 October 1993) para 2.

127 James McBride, 'The Economics of Hosting the Olympic Games', *Council on Foreign Relations* (Web Page, 19 January 2018) <www.cfr.org/background/economics-hosting-olympic-games>. Note these figures are inflated by the 2008 Beijing Summer Olympics that cost USD45 billion, and the 2014 Sochi Winter Olympics that cost in excess of USD50 billion. Excluding those events reduces the average cost for the Summer Olympics to USD15.2 billion, and for the Winter Olympics to USD4.86 billion.

to have cost their hosts an average of USD10 billion.<sup>128</sup> Yet the IOC and FIFA do not bear a significant proportion of these costs. The bulk of the costs are borne by the host country (and their taxpayers). And despite this large financial impost, countries compete vigorously for the right to host the events (although there are signs that the appetite of some countries is waning).<sup>129</sup> Officially they cite the economic benefits of hosting the event in terms of tourism, the long-term impacts from investments in stadiums, road networks and other infrastructure, and the sporting legacy from hosting the events.<sup>130</sup> And cost-benefit analyses produced by those responsible for the events generally tend to support this idea. Independent post-event studies, however, argue the opposite, and find that rarely do the benefits outweigh the costs.<sup>131</sup> If this is the case, why might countries still compete vigorously to host events and participate in such an economically lopsided partnership? The answer to this question most likely lies in their broader cultural, social and political value. As discussed earlier, hosting Olympic Games and World Cups is a source of national pride, social capital and legitimacy for the governments involved.<sup>132</sup> Understood in this way, the ability of the IOC and FIFA to offer this reward to national governments turns it into a resource that can be deployed instrumentally to influence national governments to act in a manner consistent with their objectives.

## 2 WADA

Another area where international sporting organisations and governments work closely is in the fight against performance-enhancing drugs. And here again, one finds the IOC at the vanguard. Beginning in the 1970s, the presence of performance-enhancing drugs in sports — and the Olympic Games in particular — had become increasingly obvious. By the late 1990s the practice had reached plague proportions across a number of sports and threatened sports' very integrity and continued popularity.<sup>133</sup> This threat spurred the IOC to convene the first World Conference on Doping in Sport in Lausanne, Switzerland, in February 1999, attended by representatives of governments, international sports federations, National Olympic Committees, athletes, and various other intergovernmental and non-governmental organisations.<sup>134</sup> The Conference produced the *Lausanne*

128 Emily DiNuzzo, 'This Is How Much It Costs for a Country to Host the World Cup', *Reader's Digest* (online) <[www.rd.com/culture/how-much-does-hosting-the-worldcup-cost/](http://www.rd.com/culture/how-much-does-hosting-the-worldcup-cost/)>.

129 Mark Wilson, 'Why Cities Are Becoming Reluctant to Host the World Cup and Other Big Events', *The Conversation* (online, 26 April 2018) <[theconversation.com/why-cities-are-becoming-reluctant-to-host-the-world-cup-and-other-big-events-95012](http://theconversation.com/why-cities-are-becoming-reluctant-to-host-the-world-cup-and-other-big-events-95012)>.

130 McBride (n 127).

131 *Ibid.*

132 See above Part III(A).

133 For a history of doping in sport, see Charles E Yesalis and Michael S Bahrke, 'History of Doping in Sport' (2002) 24(1) *International Sports Studies* 42.

134 'Who We Are', *World Anti-Doping Agency* (Web Page) <[www.wada-ama.org/en/who-we-are](http://www.wada-ama.org/en/who-we-are)> ('Who We Are').

*Declaration on Doping in Sport*.<sup>135</sup> This document provided for the creation of an independent international anti-doping agency to promote and coordinate the fight against doping in sport internationally and, in November 1999, WADA was established.<sup>136</sup>

WADA has two main functions.<sup>137</sup> First, it sets the global standards for anti-doping activity. Its regulatory instruments are the *World Anti-Doping Code*, its companion *Prohibited List*, and associated instruments.<sup>138</sup> The *World Anti-Doping Code* and its associated instruments have been ‘likened to international instruments and agreements which operate in areas such as international trade ... [that] seek to establish uniform practice ... [across] a wide range of legal systems’ by specifying standards, rights and liabilities.<sup>139</sup> Having established those standards, WADA then works with international and national sports federations and nation-states to ensure its effective implementation. This is its second main function.

WADA’s *Constitutive Instrument of Foundation* (its constitution) establishes it as ‘an equal partnership between the Olympic Movement and public authorities’.<sup>140</sup> This equality is reflected in the composition of its Board which is composed in equal parts by representatives from the Olympic Movement and government representatives,<sup>141</sup> and its financing. WADA receives half of its budgetary requirements from the IOC, with the other half coming from various national governments.<sup>142</sup> It also is reflected in the manner of its operations. While the imposition of WADA rules upon athletes and others involved in sporting endeavour again is a matter of contract (and therefore a private arrangement), its effective implementation relies heavily upon the hard coercive power of the state in the form of anti-doping legislation, and specialised national anti-doping

135 *Lausanne Declaration on Doping in Sport* (Declaration, 4 February 1999) <[www.wada-ama.org/sites/default/files/resources/files/lausanne\\_declaration\\_on\\_doping\\_in\\_sport.pdf](http://www.wada-ama.org/sites/default/files/resources/files/lausanne_declaration_on_doping_in_sport.pdf)>.

136 WADA, ‘Who We Are’ (n 134).

137 For an overview of WADA and the operation of the *World Anti-Doping Code* (2015), see, eg, Paul David, *A Guide to the World Anti-Doping Code: A Fight for the Spirit of Sport* (Cambridge University Press, 2008); Ulrich Haas and Deborah Healey, *Doping in Sport and the Law* (Hart Publishing, 2016).

138 The *World Anti-Doping Code* (2015) (n 137), *Prohibited List* (2019), *International Standard for Testing and Investigation* (2016), *International Standard for Laboratories* (2016), *International Standard for Therapeutic Use Exemptions* (2015), and *International Standard for the Protection of Privacy and Personal Information* (2018) are all available at: *World Anti-Doping Agency* (Web Page) <[www.wada-ama.org](http://www.wada-ama.org)>.

139 David (n 137) 87.

140 *Constitution*, World Anti-Doping Agency (at 4 July 2014) art 7 <[www.wada-ama.org/sites/default/files/resources/files/WADA-Revised-Statutes-4-July-2014-EN.pdf](http://www.wada-ama.org/sites/default/files/resources/files/WADA-Revised-Statutes-4-July-2014-EN.pdf)>. Note that WADA also is empowered to invite a limited number of intergovernmental and other international organisations (eg, World Health Organisation; Interpol; United Nations Educational, Scientific and Cultural Organisation) to act in a consultative capacity. These organisations, however, have no voting rights: at art 6(5).

141 *Ibid* art 6.

142 ‘Funding’, *World Anti-Doping Agency* (Web Page) <[www.wada-ama.org/en/funding](http://www.wada-ama.org/en/funding)>.

agencies (and thus is a public arrangement).<sup>143</sup> The requirement for nation-states to provide this assistance has been codified in the *International Convention against Doping in Sport*, adopted by the United Nations Educational, Scientific and Cultural Organization in 2005.<sup>144</sup> As of August 2019, the Convention has been ratified or acceded by 188 states.<sup>145</sup> And it is further evidence of the coercive power of the prize which provides no anti-doping compliance, no participation at the Olympic Games and other international sporting events.

However, this partnership too is not without its tensions. While on paper WADA is structured to be an equal PPP in terms of funding and committee members, the reality can be different. While WADA's six IOC members can be expected to vote as a bloc, its government representatives may not for geopolitical reasons, thereby conferring on the IOC comparatively greater operational decision-making power. This was evident in WADA's recent 9:3 decision to reinstate the Russian Anti-Doping Agency after it had been suspended for facilitating a state-sponsored scheme to hide evidence of pervasive doping, but before it had met the conditions originally set for its reinstatement.<sup>146</sup> The decision has been seen by some as a win for the IOC keen to welcome Russia back into the fold and to restore its ability to bid to host major events (which it immediately did by nominating Kazan to host the 2023 European Games, an Olympic style event for the continent), and a loss for those predominately western countries that have long advocated for stronger enforcement of anti-doping rules.<sup>147</sup>

There also is a paradox in nesting sports' anti-doping transnational legal order in domestic legal structures. State-based agencies are amenable to national constitutional and administrative law principles. This creates opportunities for athletes, clubs and other actors to challenge the local administration of WADA's regime in national courts. A recent example of this was the action brought by the Essendon Football Club to the Federal Court of Australia, its coach and players arguing that Australia's anti-doping regulator had acted ultra vires its authorising legislation.<sup>148</sup> Another example was Claudia Pechstein's challenge

143 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.

144 *International Convention against Doping in Sport*, opened for signature 19 October 2005, United Nations Education, Scientific and Cultural Organization (entered into force 1 February 2007).

145 'International Convention against Doping in Sport', *United Nations Educational, Scientific and Cultural Organization* (Web Page) <[www.unesco.org/eri/la/convention.asp?KO=31037&language=E](http://www.unesco.org/eri/la/convention.asp?KO=31037&language=E)>.

146 'WADA Executive Committee Decides to Reinstate RUSADA Subject to Strict Conditions' (Web Page, 20 September 2018) <[www.wada-ama.org/en/media/news/2018-09/wada-executive-committee-decides-to-reinstate-rusada-subject-to-strict-conditions](http://www.wada-ama.org/en/media/news/2018-09/wada-executive-committee-decides-to-reinstate-rusada-subject-to-strict-conditions)>.

147 See, eg, 'WADA's Vote to Reinstate Russia's Anti-Doping Body is a Farce', *The Economist* (online, 26 September 2018) <[www.economist.com/game-theory/2018/09/26/wadas-vote-to-reinstate-russias-anti-doping-body-is-a-farce](http://www.economist.com/game-theory/2018/09/26/wadas-vote-to-reinstate-russias-anti-doping-body-is-a-farce)>; Tom Morgan, "'Greatest Treachery': Global Fury at WADA Decision to Readmit Russia", *The Sydney Morning Herald* (online, 21 September 2018) <[www.smh.com.au/sport/greatest-treachery-global-fury-at-wada-decision-to-readmit-russia-20180921-p5054m.html](http://www.smh.com.au/sport/greatest-treachery-global-fury-at-wada-decision-to-readmit-russia-20180921-p5054m.html)>.

148 *Essendon Football Club* (n 118); *Hird* (n 118).

through Munich's Regional Courts arguing recognition of a CAS arbitral award made against her should be refused on the grounds it constituted an abuse by the International Skating Union of its dominant market position, and was therefore contrary to the public policy of Germany.<sup>149</sup> The opportunities provided by domestic legal structures for sporting actors to challenge the local administration of international sporting organisations' global regulatory order is an important feature of the evolving PPP we discuss. That to date these challenges (including the two cited) have been unsuccessful is not the point. In their existence lies the potential to undermine CAS's role as the primary adjudicator of international sporting disputes and illustrates the continuing relevance of national courts in global regulatory systems. This is a point we return to in the Conclusion below.

#### IV DISCUSSION: INSIGHTS, LESSONS AND IMPLICATIONS

So where does all this leave us at? First, we have demonstrated that taking a regulatory perspective provides a useful lens through which to analyse international sports organisations and their transnational legal orders.<sup>150</sup> International sports, like any form of international relations, is characterised by fragmentation, complexity and age-old hostilities and rivalries across cultures and geographies. Yet as we have seen, the IOC and FIFA have been able to employ a wide range of regulatory tools upon governments of different persuasion to modify their behaviour to act in accordance with their objectives — incentivising and coercing them through promises of participation and threats of non-participation; assisting them with the provision of advice, information and generous grants to their constituents; and, through the power of their discourse and ideas, persuading them (and critically, their citizens) that they are the legitimate regulator of their domains. The global regulatory regimes they have produced are excellent examples of regulatory governance on a global scale.<sup>151</sup> Globalisation has led to a reorientation of the role of the state, and the emergence of new forms of hybrid, networked or polycentric governance.<sup>152</sup> Sports' global regulatory order is a polycentric and networked regulatory regime of great sophistication — one in which the state is no longer the sole or even primary locus of authority, and in which public and private actors are both regulators and regulated, albeit with the

149 *Pechstein v International Skating Union* (Award, Court of Arbitration for Sport, CAS 2009/A/1912, 25 November 2009) (*Pechstein*). The arbitral award upheld an International Skating Union Disciplinary Commission decision imposing a two-year ban upon Pechstein for using a prohibited method of blood doping. Refusing an award in circumstances where it is contrary to the public policy of the relevant country is permitted by the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (n 113) art 5(2)(b).

150 This vindicates Duval's identification of '*lex sportiva* as a suitable playground' for research on transnational regulation: Antoine Duval, '*Lex Sportiva: A Playground for Transnational Law*' (2013) 19(6) *European Law Journal* 822, 822.

151 See Levi-Faur, 'Regulation and Regulatory Governance' (n 19) 3.

152 Braithwaite (n 11); David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598(1) *ANNALS of the American Academy of Political and Social Sciences* 12.

private actor — the international sporting organisation — the stronger actor.<sup>153</sup> Equally interesting is who is absent from this global regulatory order, namely civil society non-governmental organisations. As such there is no governance triangle in which civil society bodies act as countervailing forces and supervisors of both private actors and public authorities.<sup>154</sup>

We also have shown that it is productive to view international sports organisations through the intellectual lenses of PPP and power. Both lenses assist us to interpret and analyse the fabric of international sports' global polycentric and networked regulatory regimes, and to draw new insights from that analysis. Looking first at PPPs, we have demonstrated that notwithstanding the IOC's and FIFA's assertions of independence and autonomy, the points at which their regulatory regimes intersect with and rely upon governments are numerous.<sup>155</sup> As we have seen, the partnership language is observed at several levels ranging from the sporting event itself, to the sports' supporting regulatory structures and arrangements, through to the enforcement of the sophisticated contracts and legal mechanisms that underpin both.<sup>156</sup>

Thought of in this way, international sports regulatory regimes arguably are part of the broader PPP phenomenon, and yet fall outside the families of traditional arrangements commonly viewed as PPPs and discussed earlier. Indeed, in many respects, they defy categorisation. Sports' global PPPs are certainly more than just tools for delivering infrastructure, financing activities and sharing risks. They also are a mechanism for producing and disseminating norms that affect both public and private actors at both the national and global level — norms that merge state-based public interests and private interests to produce a greater global good to which those public and private interests become subservient.

At the same time, they also cover a wide range of behaviours. In places the partnership is cooperative and relatively equal, such as in the building of the world anti-doping regime; in others it is still cooperative but more lopsided, such as in the case of international sporting organisations outsourcing the hosting of their signature events to nation-states; and in others still, it can be outright combative and hostile, such as when international sporting organisations exercise their power to defeat attempts by nation-states to regulate the affairs of their national affiliates. Viewed in this way, the partnership has many of the characteristics of

153 Black, 'Constructing and Contesting Legitimacy' (n 19) 139–41.

154 Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42(2) *Vanderbilt Journal of Transnational Law* 501, 512–19.

155 This duality of autonomy and cooperation is itself an interesting dimension: Lorenzo Casini, 'Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)' (2009) 6(2) *International Organizations Law Review* 421, 422–3 ('Global Hybrid Public-Private Bodies').

156 See Graeme Hodge and Carsten Greve, 'Introduction: Public-Private Partnership in Turbulent Times' in Carsten Greve and Graeme Hodge (eds), *Rethinking Public-Private Partnerships: Strategies for Turbulent Times* (Routledge, 2013) 1, 4, who argue that the PPP phenomenon exists at these various levels.

a ‘dance’ — where the dance sometimes is like a waltz (close and harmonious); at other times like a tango (feisty and demonstrative); and other times still, like a street dance (improvised and combative).<sup>157</sup> It also is a dance where international sporting organisations increasingly are leading — setting both the agenda and the rules — with nation-states and their athletes relegated to the position of rule-takers.<sup>158</sup> As Allison 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’.<sup>159</sup>

Applying the PPP lens to international sports regulation identifies a number of strong parallels between the two. First, we have seen that by partnering with each other, both international sporting organisations and nation-states gain access to resources that enable them to achieve outcomes they could not attain on their own. Thus we have seen international sporting organisations benefit from the resources nation-states bring to the hosting of their mega-events and the administration and enforcement of the WADA regime. And we have seen governments use their partnership with international sporting organisations to obtain increased status and prestige on the global stage, and pride and cohesion internally. Second, we also have observed that international sports’ regulatory regimes, like PPPs more generally, rely heavily on private contract law to regulate relationships with the consequence that traditional legal pathways guarding citizen due process rights such as administrative law and freedom of information generally do not apply, although this is an aspect of the sports’ regulatory regimes that recently has come under challenge, a point that is taken up again in the conclusion. And third, we have observed that the partnership is not without its challenges. Our analysis largely has focused on the inherent tensions between the power of international sporting organisations and the sovereignty of the nation-state. However, there are other stakeholders interested and involved in international sports regulation, just as they are in traditional PPPs. In the world of traditional PPPs, these other stakeholders might include local residents impacted by an infrastructure development, taxpayers, and civil society groups concerned with the propriety, governance and transparency of the arrangements. In the world of international sports regulation, they might include the athletes, supporters, sponsors and broadcasters, and civil society groups concerned with the governance and human rights. These multiple stakeholders often hold multiple and sometimes conflicting

157 This analogy is not new. It has been used to describe business-government interactions: see, eg, Cornelia Woll, ‘Leading the Dance? Power and Political Resources of Business Lobbyists’ (2007) 27(1) *Journal of Public Policy* 57; Rosabeth Moss Kanter, *When Giants Learn to Dance* (Simon and Schuster, 1989).

158 Of course, there are exceptions. Notable among these is the establishment of WADA discussed above: see above Part III(C)(2). Another is the joint development by FIFA and the EU of player transfer rules post the *Bosman* decision: see Antoine Duval, ‘The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of *Bosman*’ in Antoine Duval and Ben Van Rompuy (eds), *The Legacy of Bosman: Revisiting the Relationship between EU Law and Sport* (Asser Press, 2016) 81 (‘FIFA Regulations’).

159 Allison and Monnington (n 92) 20, 22.

objectives for the PPP. On the surface there is a single unified goal to deliver a sports event or a piece of public infrastructure, but the reality is that there is a multiplicity of goals and therefore far greater complexity in sports policy and PPP policy, and far greater contestation when assessing the worth, value, and success of either traditional PPPs or the regulation of international sports.

As strong as these parallels are, there also are important differences and nuances. One important difference is that the PPPs that underpin international sports' regulatory regimes reflect a deeper and more interesting phenomenon than yet another standard government-business relationship. Sport is more than a consumption item acquired by turning on the television or purchasing a ticket; an international sporting event is more than an infrastructure project. As we have observed, sport has a social, cultural and political overlay to which attaches strong ideals of fairness of competition, universal friendship, solidarity, peace and understanding, and respect, courage and equality (amongst others).<sup>160</sup> Such sporting ideals understandably attract extraordinary levels of both goodwill and capital in political, cultural and financial terms. Perhaps this points to the uniqueness of international sport as the object of regulatory efforts. Another important difference (or possible nuance) is that whereas traditional 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 is coopting the public sector to assist it in delivering its private sector objectives. And whereas PPPs are often associated with increasing privatisation of the public sphere, here we are dealing with the opposite — the 'publicisation' of the private sphere. As such, it may be more correct to refer to them, not as 'public-private partnerships', but as 'private-public partnerships' — reflective of their genesis as private regimes developed in the absence of international rules (which, will be recalled, Börzel and Risse questioned as a PPP),<sup>161</sup> and of international sporting organisations' comparatively greater power and legitimacy in their spheres of operation.

This brings us to our final analytical lens — power. Our examination of the IOC and FIFA reveals that they are uniquely hybrid creatures. They are private organisations yet operate as custodians of artefacts of great social and cultural importance to the public all around the world. They are non-government organisations capable of leading significant social change yet are not civic organisations. And they are large commercial concerns capable of generating significant revenue yet do not operate as profit maximising businesses. And they do not so much compete in markets as they do monopolistically create, control, and regulate them — deciding who is in and who is out — and the rules according to which those who are in must comply in order to participate. They are at once

160 See Allison and Monnington (n 92); 'Olympic Agenda 2020' (n 95).

161 Börzel and Risse (n 31) 204.

powerful commercial concerns, agents of social change and regulators of their domains — part transnational corporation; part international non-government organisation; and part transnational private regulator. This hybrid nature confers on them a unique combination of economic, social and cultural capital. And they have historically been able to transform this capital into power. By employing Fuchs' 'three faces of power' framework, it can be seen that international sporting organisations are strong with respect to all three faces of power: structural, instrumental and discursive.<sup>162</sup>

Structurally, the IOC and FIFA have determined the structures, networks and processes of the global regulatory regime within which they, nation-states and other actors operate. They have created a prize of immense value — one that nation-states, and the citizens of those nation-states value highly and are prepared to invest in and compete for. This enables the IOC and FIFA to reward states for the provision of required resources and support or, alternatively, to punish them for failing to do so by, for example, denying their nations' teams and athletes the opportunity to participate in their competitions. The ability to grant or deny these rewards confers on them significant power over the policy agendas of nation-states. Indeed, rather than just providing agenda-setting influence, their power over these rewards (and their associated organisational structures, networks and processes) endows them with direct rule-setting power.

This ability to deny nation-states the ability to compete in and for sports' ultimate rewards is coercive in nature and, as such, is an example of 'hard' instrumental power. However, the IOC and FIFA also possess 'soft' types of power. While both organisations eschew financially contributing to political campaigns, we have seen they are generous donors to national sporting activities. This is an instrument that provides them with privileged access to policy and political decision-makers, and the opportunity to influence their decision-making. This access also enables them to build relationships, demonstrate their knowledge and expertise with respect to issues that concern them, and provide governments with expert and technical assistance to formulate policies and laws on those issues. And with their transnational reach, they are able to deploy and leverage their expertise and resources across multiple jurisdictions, enabling them to influence regulatory agendas at both the national and global level.

And finally, there is their discursive power and strong cognitive legitimacy. The IOC and FIFA have been able to use their discursive power to establish themselves as the legitimate actor in the regulatory space. They have done this by shaping societal norms and ideas, in many cases by appealing direct to

<sup>162</sup> While the following analysis looks at each face of power separately, our examination of the IOC and FIFA also has revealed that the three faces of power are 'somewhat artificial', something Fuchs' herself acknowledges: Fuchs (n 22) 65. The dimensions of power overlap and are interdependent. Structural power begets instrumental power, and instrumental power begets structural power. And discursive power and the authority that comes from cognitive legitimacy strengthens and reinforces both.

citizens and bypassing the state.<sup>163</sup> They have established in the minds of world citizens that they — the IOC and FIFA — exist to nurture and promote the purity of sport and the sporting ideal for the betterment of all mankind, unhindered and unencumbered by the national prejudices and political biases that attach to nation-states and their governments. They have been able to project their interests as being synonymous with the general interest not of any one state or people, but of all states and all people, thereby creating the perception that they have the ‘right’ to govern their sports and to the outcomes they pursue, and that operating in accordance with their interests is the ‘right’ thing to do.<sup>164</sup> The result is that their presence is so deeply rooted that it is taken for granted and barely questioned. Arguably this is their greatest source of power and authority. Indeed, at no point during the crises and controversies that have regularly befallen these organisations has there been any serious discussion of, or action taken, to abolish or replace them. The focus has always been on reform, and generally reform from within. And nor have these crises and controversies stopped the IOC and FIFA from exercising influence over nation-states with strong legal legitimacy. Black was right when she suggested cognitive legitimacy may be the most resilient form of legitimacy.<sup>165</sup>

Lastly, and now journeying outside the sporting arena, the final question to be considered is to what extent are the lessons from international sports regulation transferable to other forms of transnational regulation? Commentators such as Mitten and Opie argue that sports’ international regulatory institutions may hold valuable lessons for the development of other systems of international law, governance and regulation.<sup>166</sup> However, the transferability of such lessons may not be as straightforward as initially hoped. The lesson drawing and policy transfer literature reminds us that not all lessons are transferred successfully.<sup>167</sup> Dolowitz and Marsh, for example, identify three common causes of transfer failure: insufficient information about how the law, policy and/or institution operates in its home country or sector (which they call ‘uninformed transfer’); not transferring critical elements of what made the law, policy and/or institution successful in its home country or sector (‘incomplete transfer’); and insufficient attention being paid to the different economic, social, political and ideological contexts of the transferring and borrowing countries or sectors (‘inappropriate transfer’).<sup>168</sup> The

163 Tony Porter and Sherri Brown, ‘Why, When, and How Global Companies Get Organized’ in John Mikler (ed), *The Handbook of Global Companies* (John Wiley and Sons, 2013) 96, 107–8.

164 Mikler (n 54) 45.

165 Black, ‘Constructing and Contesting Legitimacy’ (n 19) 145.

166 Mitten and Opie (n 115). See also Casini, ‘Global Hybrid Public-Private Bodies’ (n 155) 18.

167 See generally Richard Rose, ‘What is Lesson-Drawing?’ (1991) 11(1) *Journal of Public Policy* 3; Peter J May, ‘Policy Learning and Failure’ (1992) 12(4) *Journal of Public Policy* 331; David P Dolowitz and David Marsh, ‘Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making’ (2000) 13(1) *Governance* 5, 17–20; Fabrizio Gilardi, ‘Who Learns from What in Policy Diffusion Processes?’ (2010) 54(3) *American Journal of Political Science* 650.

168 Dolowitz and Marsh (n 167) 17–20.

transferability of lessons from international sport to other regulatory endeavours appears to be especially vulnerable to both incomplete and inappropriate transfer. Incomplete because, as we have seen, international sporting organisations such as the IOC and FIFA are unique hybrid creatures whose power, legitimacy and authority emanates from their ability to create and leverage a prize of unique social and cultural value, singular clarity and strong cognitive legitimacy. Such prizes do not seem to exist in fields such as international trade, public health, the environment or even human rights. And inappropriate because, as we observed earlier, the uniqueness of not only international sporting organisations as institutions, but of international sport itself as the object of regulatory efforts, creates an economic, social, political and ideological context not capable of being replicated by other sectors. These differences risk aspirants in these other arenas being left to admire what they cannot attain. Perhaps our hopes and expectations for a transfer of lessons to these other arenas ought to be more modest.

## **V CONCLUSION: THOUGHTS TO THE FUTURE**

In the global governance literature, there is acceptance that power has shifted from nation-states to transnational corporations ('TNCs'). The same is true — and even more so — in the case of international sports organisations. And whereas much of the power of TNCs is said to stem from the significant financial, human and technical resources they command, in the case of international sports organisations, power stems from the unique social and cultural infrastructure and capital they now command.

As we have seen, they have employed their power to create a sophisticated and coherent global legal and regulatory regime. It also is a regime that has proven to be stable and resilient in the face of scandal, and government attempts to impose themselves upon it. One might be forgiven for thinking it unassailable. However, no regime is immutable. Even mighty empires fall. Sports' global regulatory order reflects agreement among those with power at the present point in time. But power dynamics evolve, and new actors with power and resources who are not as accepting of the status quo can emerge. This can lead them to seek to reopen existing compacts, or to create new sites for political and legal consternation and debate.<sup>169</sup>

Recently we have witnessed the emergence of actors with countervailing power and legitimacy who have been able to extract changes and concessions from the IOC and FIFA. For example, we have seen human rights groups successfully lobby both organisations to have human rights standards included in host

<sup>169</sup> See Edward S Cohen, 'Investment Law as a Window into the Pluralism of Transnational Legal Orders' (Conference Paper, Annual Meeting of the Law & Society Association, 7–10 June 2018).

city contracts.<sup>170</sup> And we increasingly are seeing sponsors play an active role, especially in circumstances where the sports organisation's actions do not appear to match the values to which their sponsors aspire. In this regard, FIFA's sponsors have been credited with forcing FIFA President Sepp Blatter to step down after pressure from affiliated national federations — and the governments of those nations — failed to prevent his re-election.<sup>171</sup>

We also are seeing brave athletes challenge perceived abuses emanating from international sports organisations' monopoly positions. Arguably the most important of these was Marc Bosman's successful challenge under European Union ('EU') law to FIFA's player transfer rules. Interestingly, this case led to FIFA, FIFA's European confederation, the Union of European Football Associations, and the EU Commission, working cooperatively to develop new and compliant player transfer rules, itself an example of public-private transnational law-making.<sup>172</sup> And more recently there have been athlete challenges to sports' governing rules on human rights grounds. As noted earlier, these challenges led the European Court of Human Rights to recognise a right to a public hearing for doping offences.<sup>173</sup> They also have been the impetus for self-reflection on the part of CAS and changes to the nomination process and composition of its list of arbitrators, an acknowledgement from CAS that it should better respect athlete rights — and one that opens up the possibility of a dialogue with both governments and civil society on a coherent set of norms to ensure that athletes' human rights are upheld, domestically and internationally.<sup>174</sup>

And finally there have been instances of nation-states acting against and/or independently of the IOC and FFA. For example, national law enforcement agencies in the United States and Switzerland continue to investigate corrupt practices within FIFA,<sup>175</sup> and some nations have extended their anti-doping regime beyond the parameters sanctioned by WADA by including criminal offences and sanctions leading some commentators to query whether the future of the anti-

170 International Olympic Committee, 'IOC Strengthens Its Stance in Favour of Human Rights and against Corruption in New Host City Contract' (Press Release, 28 February 2017); FIFA, *Guide to the Bidding Process for the 2026 FIFA World Cup* (Guide) <img.fifa.com/image/upload/hgopyppftviladnm7q90.pdf>.

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

172 Duval, 'FIFA Regulations' (n 158).

173 See above n 4.

174 Ulrich Haas, 'Role and Application of Article 6 of the European Convention on Human Rights in CAS Procedures' (2012) 12(3) *Sweet & Maxwell's International Sports Law Review* 43, 46; Antoine Duval, 'The Court of Arbitration for Sport after Pechstein: Reform or Revolution?' *Asser International Sports Law Blog* (Blog Post, 17 November 2015) <www.asser.nl/SportsLaw/Blog/post/the-court-of-arbitration-for-sport-after-pechstein-reform-or-revolution>.

175 See above n 119 and accompanying text.

doping regime may lie more in the hands of nation-states, than WADA.<sup>176</sup>

Time will tell whether these developments are signs of international sporting organisations' global regulatory order fraying before its fall, or whether they are another stage in the evolution of their PPP relations with nation-states. Given the power and legitimacy of international sporting organisations, we suspect the latter. Viva la evolution!

176 Barrie Houlihan, 'Building an International Regime to Combat Doping in Sport' in Roger Levermore and Adrian 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) <[theconversation.com/sports-anti-doping-bodies-wont-reform-themselves-but-nation-states-can-break-the-deadlock-103636](http://theconversation.com/sports-anti-doping-bodies-wont-reform-themselves-but-nation-states-can-break-the-deadlock-103636)>.