Is There a Global Sports Law?

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How can international sporting federations be regulated by law? This question is analytically dependent on a narrower question, whether there is a definable concept called international sports law. This article distinguishes between 'international sports law' and 'global sports law'. International sports law can be applied by national courts. Global sports law by contrast implies a claim of immunity from national law. Conceptually, it is a cloak for continued self-regulation by international sports federations and a claim for non-intervention by national legal systems and by international sports law. It thus opposes a rule of law in regulating international sport.

Introduction

The globalisation of sport has moved the focus of legal regulation increasingly onto international sports federations. These organisations control and govern international sport. They have rulebooks and constitutions. They take decisions that can have profound effects on the careers of players and that have important economic consequences. They are autonomous organisations and are independent of national governments. How they are governed and how their activities are regulated are key questions. In particular they claim an immunity from legal proceedings that is almost unique amongst international NGOs. The IAAF expressed a typical attitude among international sporting federations in 1992. When sued in the American courts for banning Butch Reynolds from international athletics, the governing body of the sport replied, 'Courts create a lot of problems for our anti-doping work, but we say we don't care in the least what they say. We have our rules, and they are supreme.'[1]

In this article, I address the question of how, if at all, international sporting federations can be regulated by law. This question is analytically dependent on a narrower question, whether there is a definable concept called international sports law. I propose a distinction between 'international sports law' and 'global sports law'. International sports law

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can be applied by national courts. Global sports law by contrast implies a claim of immunity from national law. Some authors have used the concept '*lex sportiva*' in a superficial manner to describe what is happening with the globalisation of sports law. I argue that *lex sportiva* should be equated to 'global sports law'. To define it thus as 'global sports law' highlights that it is a cloak for continued self-regulation by international sports federations. It is a claim for non-intervention by both national legal systems and by international sports law. It thus opposes a rule of law in regulating international sport.

International Sports Law v. Global Sports Law

Initially it is necessary to distinguish between the concepts of 'international' and 'global' sports law. International law deals with relations between nation states. International sports law therefore can be defined as the principles of international law applicable to sport. Nafzinger has argued that, 'as an authoritative process of decision-making and legal discipline, international sports law is as much a matter of international law as of sports law'.[2] He clearly sees it as a branch of international law. For him, one of the chief aspects of international sports law is that it uses the *jus commune*, that is, the general principles of international law.

International sports law is, however, wider than those principles that can be deduced from public international law alone, and includes additional 'rule of law' safeguards that are significant in sport. These include the principles underpinning constitutional safeguards in most western democracies. A provisional list would include clear unambiguous rules, fair hearings in disciplinary proceedings, no arbitrary or irrational decisions, and impartial decision-making. These are general legal principles that can be deduced from the judgments of national courts in sports law cases.

Global sports law, by contrast, may provisionally be defined as a transnational autonomous legal order created by the private global institutions that govern international sport. Its chief characteristics are first that it is a contractual order, with its binding force coming from agreements to submit to the authority and jurisdiction of international sporting federations, and second that it is not governed by national legal systems. It would be in Teubner's phrase truly a 'global law without a state'.[3] It is a *sui generis* set of principles created from transnational legal norms generated by the rules, and the interpretation thereof, of international sporting federations. This is a separate legal order that is globally autonomous. This implies that international sporting federations cannot be regulated by national courts or governments. They can only be self-regulated by their own internal institutions or by external institutions created or validated by

them. Otherwise they enjoy a diplomatic-type immunity from legal regulation.

This distinction between international and global sports law reproduces the difference between a model of internationalised and globalised sport as developed by Houlihan.[4] He argues that 'internationalised sport', like international law, is firmly based on nation states. Internationalised sport is often funded by state subsidy and has a national framework of regulation.

'Globalised sport' by contrast has nationally ambiguous or rootless teams, 'sport without a state', as in professional road cycling or Formula One motor racing, where teams are named after corporate sponsors. Globalised sport has a uniform pattern of sport that diminishes national traditions and local diversity. Sports rely on commercial sponsorship rather than state funding. Houlihan summaries the different frameworks of regulation thus:

> Globalised sport would be typified by minimal regulation or a pattern of self-regulation while under conditions of internationalised sport national of regional (e.g. European Union) systems of licensing, certification and training would produce a mosaic of distinctive regulatory systems and patterns of 'good governance'.[5]

This distinction of Houlihan's between internationalised and globalised sport in turn builds on Hirst and Thompson, who have argued that there is a distinction between an internationalised and a globalised economy.[6] For them, an internationalised economy is characterised by a world system in which national economies are predominant and the principal organisational form is the multinational corporation, firmly located in a single national economy. These features allow the regulatory control of such corporations to be placed within a national framework or in an international regime based on supra-state institutions. On the other hand, a globalised economy subsumes distinct national economies into an 'autonomised and socially disembodied' global economy. This makes governance and the regulation of transnational corporations, which are genuinely rootless and footloose, fundamentally problematic.

This clear distinction between international and global sports law shows that they are different concepts, which need careful analysis. To conflate the two concepts into a single concept, called *lex sportiva*, is misleading. In particular to describe what is happening with the globalisation of sports law as *lex sportiva* is to imply that international sporting federations are legally immune from regulation by national legal systems. This allows the private regimes of international sporting federations, such as the IOC or FIFA, to be legally unaccountable except by arbitration systems established and validated by those very same private regimes.

International Governance of Sport

International sporting federations legislate and create their own general norms. They operate a discrete independent regulatory regime globally. In this sense they are a legally plural regime independent of nation states. They can thus be said to create an 'international governance of sport'. Is there is a distinct character to the rules that emerge from this international governance? Can these rules rightly be termed *lex sportiva* so that they should be immune from national legal regimes? Do international sporting federations have a distinct sphere of legal autonomy for their governance of sport? To answer these questions needs a careful analysis of the definitions used in this field.

The rules that are applied to sport can be classified into four types:

1. The rules of the game. Each sport has its own technical rules and laws of the game. These are usually established by the international sporting federations. These are the constitutive core of the sport. They are by definition unchallengeable in the course of the game.
2. The ethical principles of sport. These are not technical formal rules but govern issues of fairness and integrity. They cover what is usually referred to as 'the spirit of the game'. These general principles can be at issue whenever sporting associations are challenged in the courts. They represent a distinct 'legal' order with its own characteristics that are specific to each sport. But this is an internal *lex specialis*, not distinctively global even when administered by international sporting federations.
3. International sports law. This is accepts that there are general principles of law that are automatically applicable to sport. Basic protections, such as due process and the right to a fair hearing, are by this route incorporated into sport and represent a 'rule of law' in sport.
4. Global sports law. This describes the principles that emerge from the rules and regulations of international sporting federations as a private contractual order. They are distinctive and unique.

The Rules of the Game

First, there are the rules of the game. Without rules there is no game. It is of the very essence and foundation of sport that there are agreed rules by which to play. The jurisdiction over, and the regulation of, these technical rules by international sporting federations is separate. An external legal order does not create the technical and constitutive internal rules of sport. The rules of a game are essentially meaningless and arbitrary. If the laws of football say that a goal at football is scored in a certain way, or that a try at rugby is

worth four points, this is an area of regulation that cannot be legally challenged.

These internal legislative rules are constitutive of the sport. But does that render them inviolate? The traditional view has been that it does. The distinction between the rules of the game and other matters that international sporting federations regulate is clear in principle but not necessarily easy to draw in practice. The Court of Arbitration for Sport tried to draw a line of demarcation in an award at the Atlanta Olympic Games in 1996.[7] This concerned the disqualification of a boxer for a low blow against the rules. The Panel described the traditional theory that there is a 'distinction between what can be submitted to a court or arbitration panel – rule of law – and what cannot – the game rule.'[8] It however admitted that this was a vague distinction and that the more modern theory was to ignore the distinction in 'high level sport' because of the economic consequences.[9] On this view there is no automatic legal immunity for the game rules. They are indistinguishable from any other kind of rule. The Panel however accepted that the judicial power to review the application of the game rules was 'limited to that which is arbitrary or illegal',[10] or in violation of 'social rules or the general principles of law'.[11] This suggests that even the rules of the game may not be immune from legal review. However, in *Agar* v. *Hyde*, the Australian High Court considered whether a governing body could be held to be negligent when drafting the rules of the game or for failing to alter the rules.[12] The Court decided that they could not.

The Ethical Principles of Sport

A second distinctive type of rules governs what can loosely be described as the essence or spirit of sport, or sporting principles. These might be described as the equitable principles behind the formal rules of sport. The reflection of these equitable principles can be seen in the general purpose offence that exists in most sporting association's rules of 'bringing the sport into disrepute' or some similar formula. Here international sporting federations are trying to reserve to their own sphere of regulation the moral principles that they see as inherent in sport. There are at least four distinctive strands to this type of rule: fairness, integrity, sportsmanship, and the 'character of the game'.

1. A key element in sport is the uncertainty of outcome. To preserve this key commercial and competitive factor, it is felt necessary to produce fair and equal contests. A clear example of this is the handicapping of horses to carry different weights in a race to give each horse the same chance of winning. How such equalisation of opportunity can be achieved in any particular sporting contest can only be determined by

those with the necessary technical expertise. Such a technical judgement is normally considered to be beyond the review of the courts. Racehorse trainers sometimes complain that their horses are unfairly handicapped. There is central handicapping in British racing, so that a horse's rating applies to any race that it could enter. There is no appeal allowed by the Rules of Racing against this rating. But what if a rating was given maliciously to prejudice deliberately the connections of the horse? Would the courts intervene?

2. A second strand to these 'sporting principles' is the honesty and integrity of sport. Many activities that are legally and morally acceptable outside the sporting arena may become unacceptable within it. Restrictions on officials and players betting on games, or the taking of money from bookmakers for inside information, can appear to threaten the integrity of the sport and be punishable within the rules of the sport. Doping regulations have stringent standards that mean that the standard of proof that is applied for doping offences is lower than that of the criminal law.
3. A third strand is sportsmanship or the spirit of the game. This refers to the good faith in which the players of the game interpret the rules and understandings of the sport, so that certain actions whilst not strictly against the laws of the game are nevertheless just 'not cricket' and against the spirit of fair play. Just what is and is not against the spirit of the game, it is argued, can only be identified and understood by those who have played the game. It is an insider's esoteric art and cannot be applied by an outsider.
4. The fourth and final distinctive element is the character of the sport. Changing the technical rules of the sport can have profound economic and sporting consequences and so alter the essential character of the sport. Motor racing provides an example where the regulations on technical specifications can be more decisive than the skills of the drivers. It is argued that the supervision and alteration of such regulations need to be given to experts with a feel for the character of the sport and not subject to external review.

International Sports Law

A third set of rules is what I would call international sports law. This is the location of legal rules as commonly understood. For example, the Court of Arbitration for Sport in a recent arbitration said they comprised a major element of *lex ludica*:

> all sporting institutions, and in particular all sporting federations, must abide by general principles of law … Certainly, general principles of law drawn from a comparative or common denominator reading of

> various legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such lex ludica.[13]

What is the source of these general principles? One answer might be that they are part of international customary law – the *jus commune*. Mertens has listed principles such as 'pacta sunt servanda,[14] equity, the doctrine of proportionality, doctrines of personal liability, the prohibition of unjust enrichment, and the doctrine of clausula rebus sic stantibus'.[15] These are universal principles of law that cannot be ignored by international sporting federations, and they can and should be enforced by any available legal institution that has jurisdiction. Their universal character means that international sporting federations are not free to apply or interpret them as they wish. Their autonomy is limited.

Global Sports Law

A final type of rule is contained in 'global sports law'. This is the unique and distinctive site for creating new norms that have social and legal force. It rests conceptually on being able to show that international sporting federations can create their own norms. These are created in the practice, rules and regulations of international sporting federations.

I would confine the term 'global sports law' to these norms. To exist it requires all these conditions:

1. An organisation with constitutional governing powers over international sport. This would normally, but not necessarily, be an international sports federation. However the legislative competence of the organisation is necessary to create the normative underpinning that gives social obligation to the rules that are created.
2. A global forum for the resolution of disputes. There needs to be an external system of international arbitration, either on an *ad hoc* basis or through an international institution. This must have a global jurisdiction and can apply all aspects of 'international sporting law'.
3. Global sports law has distinct and unique norms. These norms are however only the custom and practice that originate within international sporting federations. They need to be sufficiently generalised and harmonised within this transnational context to be valid.
4. But they are *not* a set of comparative law principles: 'general principles of law drawn from a comparative or common denominator reading of various legal systems' to quote the Court of Arbitration for Sport above. This is encompassed by international sports law.
5. Global sports law creates an 'immune system' that is respected by

national courts. It is de-localised and does not require specific recognition or validation by a national legal system. This is because it is inherently transnational. It operates as a constitutional directive to national courts that there are global principles that grant autonomy to the global sporting system. The context of international sport is thus declared to be one where states are unable or unwilling to regulate.

Lex Sportiva

The fundamental distinction between international sports law and global sports law is crucial. Recently, various authors have argued for the distinctiveness of 'international sports law' but in doing so they describe it as '*lex sportiva*'.[16] This usage creates confusion; conflates 'international' and 'global' sports law as I have defined it; and disguises a crucial policy choice as to whether international sports federations can be allowed to be self-regulating.

This view of *lex sportiva* has been put forward, for example, by the authors of a recent textbook on sports law.[17] This deserves respect, for one of the authors, Beloff, is a distinguished advocate and arbitrator for the Court of Arbitration for Sport. He argues that sports law is 'inherently international in character' because its 'normative underpinning' is in the constitutions of international sporting federations.[18]

Lex sportiva for Beloff has three main elements:

- it has transnational norms generated by the rules and practices of international sporting federations,
- it has a unique jurisprudence, with legal principles that are different from those of national courts, and which is declared by the Court of Arbitration for Sport, and
- it is constitutionally autonomous from national law.

This suggests that Beloff sees *lex sportiva* as an example of global law, without using the term; 'its normative underpinning derives not from any treaty entered into between sovereign states but from international agreements between bodies, many of which are constitutionally independent of their national governments'.[19] This appears to be distinguishing between global sports law, as a contractual private order that makes its own rules, and international law, as constituted by treaties between nation states, which may apply to sport.

Beloff continues by seeing the distinctiveness of this global sports law, *lex sportiva*, reflected in the emerging jurisprudence of the Court of Arbitration for Sport. This is an agent of the global sovereign power in sport, the International Olympic Committee. Beloff claims that the legal

principles that it applies are *sui generis* principles not found elsewhere. The implication is that these principles are not derived from national legal systems and thus cannot be enforced through national courts. It also implies that these are not principles found in international law. This too is characteristic of global law.

As well as being international and distinctive, Beloff also argues that the function of *lex sportiva* is to demarcate realms of authority in the sporting context. He says that that the foundation principle, the 'cornerstone' of *lex sportiva*, is to allow 'autonomy for decision making bodies in sport' and to establish a 'constitutional equilibrium' between courts and sports federations.[20] This implies that the context of international sport is one where nation states are unable to regulate.

Beloff thus implictedly uses the distinction between international and global sports law. 'International sports law as inherently international in character' is a descriptive claim by Beloff but analytically it conflates international and transnational norms into a single ambiguous term.[21] Either 'international sports law' as used by him reflects distinct and original principles that are specific to the nature of sport, that is, the transnational norms that characterise global law, or it is a subdivision of public international law drawing on the same type of sources as other subdivisions. This difference needs to be made clear if only because it is crucial to the issue of self-regulation.

Beloff states that 'international sports law' is more than an aggregation of national norms. This implies that there is a distinct and special body of law. He argues that 'international sports law' produces *sui generis* principles not found elsewhere. This seems to claim conceptual originality for such doctrines, which places them in the category of global law, rather than a view that these doctrines are reflective or analogous to doctrines found elsewhere in international law.

However, when Beloff lists the sources of 'international sports law', he appears to imply that it is a subdivision of public international law drawing on the same type of sources as other subdivisions.[22] A careful analysis of these supposedly *sui generis* principles reveals that they are familiar examples of international law applied to a new situation. They are separate and identifiable legal sources well known to international lawyers. *Lex sportiva* as a set of unique norms seems to disappear.

For Beloff, the doctrinal and conceptual principles of an 'international sports law' cannot be developed fully except by a discrete institution. Without an international sports court, there can be no distinct jurisprudence and without that there is, for him, no real international sports law. So the recognition of the Court of Arbitration for Sport as the prime institutional source of 'international sports law' is a key feature of

Beloff's argument, but again this is characteristic of a global sports law.

Beloff also argues that the foundation principle, the *Grundnorm*, for 'international sports law' is autonomy for the decision-making process of international sporting federations. This is an argument for legal immunity and non-intervention in the affairs of a private body. Beloff's description suggests that there is some kind of constitutional settlement, a 'constitutional equilibrium' which 'international sports law' prescribes, that defines the issues on which national courts will not or cannot interfere. It is unclear how this balance is achieved. Is it granted by the national courts themselves, recognising the autonomy of international sporting federations, or is the 'constitutional equilibrium' prescribed by the international legal order? Beloff seems to indicate, in a final attempt at the definition of 'international sports law', that 'at its centre [is] an unusual form of international constitutional principle prescribing the limited autonomy of non-governmental decision making bodies in sport'.[23] Yet again this appears to be a description of global sports law. Overall the conclusion is Beloff is using the specific characteristics of global sports law (unique norms, separate institutional interpretation, constitutional autonomy), whilst nevertheless describing the jurisprudence in a way that is consistent with international sports law.

Lex Sportiva as Lex Mercatoria

So Beloff's proposed *lex sportiva* is ambiguous as to whether it is international sports law or global sports law. His *lex sportiva* contains sufficient elements that suggest that he is arguing for the emergence of an autonomous legal order outside the review of national legal systems. I therefore for the purpose of analysis will assume that he is describing as *lex sportiva* what I have defined as a global sports law.

Lex sportiva deliberately invokes the concept of *lex mercatoria*. *Lex mercatoria* has a long history and a considerable literature.[24] There is no agreed meaning as to what is included in the concept '*lex mercatoria*'. Three key elements in it however seem to be:

- its norms are generated by the international custom and practice of commercial contracts and these practices have become standardised,
- arbitration is deemed to be superior to litigation as a method of settling disputes, and
- it can contain provisions to prevent the application of national laws.

These three key elements are more or less identical to the three elements listed above as central to Beloff's use of the concept *lex sportiva*. It seems relevant therefore to assume that the theoretical problems that are likely to

be encountered in using the concept *lex sportiva* will mirror those that have already been widely discussed in the literature of *lex mercatoria*.

There are two fundamental questions about the nature of *lex mercatoria* that are highlighted in this literature. First, can an arbitrator decide an international dispute on principles of law that are independent of any national legal system? Second, if the answer to this is positive, how do these unique principles of *lex mercatoria* get their binding legal force?

The first question implies that there are general principles of law independent of national legal systems, which can be readily identified. One list includes the following, 'pacta sunt servanda, equity, the doctrine of proportionality, doctrines of personal liability, the prohibition of unjust enrichment, and the doctrine of clausula rebus sic stantibus'.[25] These are general principles, however, that may not be entirely independent of national systems. Some might argue that these are principles of international customary law that national courts may have a duty or discretion to apply. Others may argue that they are simply an articulation of principles implicit comparatively in all legal systems. Whatever their status, they do not appear as independent legal principles that will override national law.

Another way of posing the same question is this: can an arbitrator apply *lex mercatoria* independently of any national legal system? It is clear that the parties to an arbitration can agree to have their dispute resolved by any applicable law if that is their express or implied intention. This could include an agreement to resolve the dispute by reference to 'general principles of law'. How could such an arbitration award be enforced? Only in practice by the machinery of a national legal system that is prepared to recognise the validity of the arbitration. The national legal system is needed to make *lex mercatoria* effective.

The second question is how does *lex mercatoria* get its binding force? Is it necessary for it to be validated by national law as a legitimate source of law, or can the contracting parties to an arbitration agree to exclude national laws and apply only *lex mercatoria*, or does it apply independently of national legal roots and the wishes of the parties? It is the last of these possibilities that would be the strongest example of *lex mercatoria* as an autonomous legal order independent of any validating root in any national legal system.

As Teubner has argued, the ultimate validation of *lex mercatoria* must rest on a rule of recognition that private orders of regulation can create law and thus an acceptance of the legal pluralist argument that not all legal orders are created by the nation state.[26] An autonomous legal order, on this argument, can emerge from a transnational network of commercial practice. However, as Teubner further argues, this produces 'the paradox of self-validating contract'. This law/rule is valid because we agree that it is valid.

The validity of the private order of *lex mercatoria* thus cannot logically rest on contractual agreement.

One way out of this paradox is 'closed circuit arbitration'. This refers to a process where a self-regulating constitution creates a global private order with procedural rules that require disputes to be referred to the private institution that created and legislated for the private order in the first place. This is what closes the circuit. An alternative way out of the paradox is what Teubner calls externalisation. A reference of a dispute to an external institution by contractual agreement still leaves the problem of self-reference. An external arbitrator judges the validity of an agreement to apply *lex mercatoria* by reference to the agreement that validates her power. However, Teubner argues that this externalisation allows the private order to generate its own 'official and organised' law that is different from the spontaneous order of customary norms and is the necessary precondition for the development of a dynamic *lex mercatoria*.

Beloff's argument for a *lex sportiva* seems to be analogous to the arguments for a *lex mercatoria* and to ignore or minimise the same problems of validation. How and where does this private contractual order gain its legitimacy?

Global Sports Law and its Autonomy

This section addresses the issue of global sports law as an autonomous legal order. Rather than rely on an argument that there is an autonomous *lex sportiva*, international sporting federations have to date claimed that they are non-accountable to national legal regimes on other grounds. This claim for legal autonomy has previously been based on international law principles and has taken several forms. There are four main arguments.

First, the widest and boldest version of this claim is that international sporting federations are simply not legally accountable. Rather like English trade unions from 1906 to 1982, they are legally immune for all their actions. This immunity of international sporting federations stems from both their international nature and from the character of their governance. The international sporting federation with many elements of this diplomatic immunity, enshrined in international customary law, is the International Olympic Committee. Indeed the International Olympic Committee operates almost as a quasi-state, and states are of course not triable in national courts by virtue of international law.

The international status of the International Olympic Committee as an equal international personality was implied by the US courts in litigation arising out of the decision by the United States Olympic Committee not to

send a team to the 1980 Moscow Games as a protest against the Soviet invasion of Afghanistan.[27] The powers of the USOC stemmed from the Amateur Sports Act 1978, which spoke of the USOC representing the United States 'as its national Olympic committee in relations with the International Olympic Committee'.[28] This wording implied that the process was one of international negotiation with an equal state actor. The Act did not create nor grant legal powers to the USOC, rather it recognised the existing authority and that this stemmed from the International Olympic Committee directly. The judgment said that:

> Congress was necessarily aware that a National Olympic Committee is a creation and a creature of the International Olympic Committee, to whose rules it must conform. The NOC gets its power and its authority from the International Olympic Committee, the sole proprietor and owner of the Olympic Games.

This 'state actor' status of the International Olympic Committee is also implied in its constitution. Rule 1 of the Olympic Charter states that the International Olympic Committee is 'the supreme authority of the Olympic Movement', and Rule 9.2 says that the 'authority of last resort on any question concerning the Olympic Games rests with the International Olympic Committee'. There has been legal debate as to whether the International Olympic Committee has status as an international legal personality.[29] It defines itself as an international non-governmental organisation. The classic definition of international legal personality has been the capacity to enter into legal obligations at the international level and to enter into relations with other international persons such as nation states. The International Olympic Committee undoubtedly satisfies these criteria. In addition the Swiss Federal Council, which is where the International Olympic Committee is domiciled, has legislatively granted the International Olympic Committee a special legal status that recognises it as an international institution. However the application of similar arguments to other international sporting federations such as FIFA is less sure.

Second, a more limited claim than total immunity is for the superior level of regulation by international sporting federations. They create a hierarchy of interlocking norms that ensures that they have jurisdiction over everyone and everything connected with the sport internationally. This translates into a claim that their own regulations have precedence over national laws and that athletes have a primary obligation to those rules rather than to the law of the land. It is this claim that makes *lex sportiva* of interest to legal pluralist theorists. In most examples of legal pluralism, the claim that there are parallel legal orders within a nation state is ultimately translated into an

implicit or explicit recognition that a field of semi-autonomous validity is permitted to the parallel field by the superior national legal regime. What is different with *lex sportiva* is that it trumps national law and makes the sports person primarily obligated to the rules of the international sporting federation. On this analysis, this is a claim that, as an international institution, an international sporting federation can by their rules and regulations create global law and this will therefore be recognised as binding by national courts.

This does not however seem to be the view of the English courts. In *Cooke* v. *FA* in 1972 they were adamant that the 'binding authority' of FIFA's regulations were not a defence available to a national association when it was found to be acting in restraint of trade.[30] In 1981, Lord Denning said in *Reel* v. *Holder*, 'we are not concerned with international law or with sovereignty. We are simply concerned with the interpretation of the rules of the IAAF'.[31] In their study, Wise and Meyer conclude that:

> It appears that UK courts do not recognise international, continental or national sports governing bodies as having the status of governmental or quasi-governmental organisations. Nor do they recognise them as having or bestow upon them any sovereignty or sovereign or sovereign-like immunity from being sued or from execution against their assets.[32]

These conflicting pressures can leave national sporting associations caught in the middle. On the one hand, they are agents and members of their international sporting federation and as such they are expected and contractually bound to obey their regulations. Failure to do so will normally result in sanctions being imposed by the international sporting federation, which could lead to suspension or expulsion from the international sporting federation. In sporting terms this is a serious deterrent and severe penalty for any national association and for the sports people under its jurisdiction who will find themselves excluded from international competition. On the other hand, a failure to obey national laws will bring them into conflict with their courts and can result in court orders against them.

Third, *lex sportiva* can be seen as a directive to national courts that they must follow. It sets global standards and principles that delineate the respective areas of regulatory competence. In other words, it draws the line for non-intervention by courts and legislatures into the affairs of international sporting federations and by extension, in so far as they are agents of the international sporting federation, into the affairs of national sporting federations. The US courts refused to interfere with the programme of the 1984 Los Angeles Olympic Games declaring that:

> a court should be wary of using a state statute to alter the content of the Olympic Games. The Olympic Games are organised and conducted under the terms of an international agreement – the Olympic Charter. We are extremely hesitant to undertake the application of one state's statutes to alter an event that is staged with competitors from the entire world under the terms of that agreement.[33]

Fourth, international sporting federations also claim autonomy for their methods of dispute resolution. They attempt to have exclusive jurisdiction and prevent athletes from accessing national courts. They do this in various ways. One is to state in the rulebooks that decisions are 'final and binding' and that the athlete has no final appeal to the courts. These can be termed sporting 'exclusion clauses'. A second method is to make compulsory in their rules that disputes can only be taken to private arbitration. This arbitration panel will usually be an 'independent' appeal body set up by the international sporting federation or increasingly the Court of Arbitration for Sport. Here the genuine independence of the arbitration body as well as the compulsory nature of the arbitration clause can become a legal issue. In both these examples, the real consent of the athlete to the provisions of the rulebook can also be a legal issue. A third way is that athletes are now being asked to sign agreements not to take legal action against international sporting federations as a precondition of taking part in international competitions. Such waivers have been used at the last three Olympic Games. The intent of these tactics is to create a zone of private justice within the sporting field of regulation, which excludes judicial supervision of, or intervention with, decision-making. It denies athletes access to national courts and leaves them dependent on the arbitrary justice of the international sporting federations themselves. They can claim justice only from an arbitration panel created and appointed by the international sporting federation itself, or at best the Court of Arbitration for Sport.

Conclusion

The essence of global sports law or *lex sportiva* is that it is an argument for self-regulation or for a private system of governance and justice. This raises the possibility that *lex sportiva* as a legal concept will be used to disguise fundamental issues of regulation. *Lex mercatoria* is a false analogy. *Lex mercatoria* is ultimately justified as a private autonomous global law because it rests on contract. *Lex sportiva* rests on a fictitious contract. Although the relationship between an international sporting federation and an athlete is nominally said to be contractual,[34] the sociological analysis is entirely different. The power relationship between a powerful global

international sporting federation, exercising a monopoly over competitive opportunities in the sport, and a single athlete is so unbalanced as to suggest that the legal form of the relationship should not be contractual. Rather like the employment contract, a formal equality disguises a substantive inequality and a reciprocal form belies an asymmetrical realtionship. This inequality makes it misleading to use *lex mercatoria* as an analogy for the development of ideas about *lex sportiva*.

I conclude by asking what the principles of intervention are that national courts should use in dealing with international sporting federations, using the four categories employed above.

1. The rules of the game are best left to self-regulation simply because they are constitutive. This essential characteristic makes them unchallengeable by any institution including national courts. Any suggestions otherwise by the Court of Arbitration for Sport are to be regretted. Whilst it may be correct that international sporting federations are liable for foreseeable injury caused by the danger inherent in the formal rules of the game, this is a risk that they can legitimately carry. The remedy for this fault lies in compensation not in a rewriting of the rulebook. I would justify this area of self-regulation not on the ground of autonomy for private organisations but in the constitutive nature of the basic rules of the game.
2. The ethical principles of sport are autonomous and outside the review of national courts. This is because the nuance of what is broadly called 'the spirit of the game' is best treated as a technical question. It is thus akin to a trade usage or customary norm, which can be proved independently for a court by experts from within the sporting field. However this is not an unlimited autonomy. The presumption should be capable of rebuttal and the national courts should have jurisdiction if economic damage is caused by arbitrary or irrational decisions.
3. The general principles of the rule of law as expressed by international sports law are implied into the governance of international sport. If not expressly incorporated into the rules or practice of international sporting federations, they must be applied either by transnational arbitration or by national courts. These general principles cannot be excluded even by express agreement. Such attempts must be declared void.

Global sports law, in so far as it exists, is trying to become a *lex sportiva* that will be an autonomous transnational legal order. This will allow it to be respected by national courts. There are necessary pre-conditions however for a *lex sportiva* to be recognised as autonomous by national legal systems: a global constitutive body, a global forum for dispute resolution,

transnational and unique norms. Global sports law has some way to go before these three criteria are fulfilled.

1. Most international sporting federations have a global monopoly over their sport. The International Olympic Committee still has some way to go before it has a global legislative and constitutional power over international sport. So the constitutional framework is not complete. Harmonisation of rules has some way to go.
2. The Court of Arbitration for Sport as the institutional forum is similarly not globally comprehensive. It has improved by becoming more independent of the International Olympic Committee and thus satisfying Teubner's criterion of externalisation but it does not yet cover all sports.
3. The norms of global sports law need to be unique. They cannot simply be the incorporation of general principles of public international law, for these have an independent validity and application. The rule of law in sport also operates upon sport and does not emerge from the practice of international sporting federations. So the unique context of *lex sportiva* cannot come from either of these sources. There needs to be a distinctive jurisprudence.

Until the independent legitimacy and validity of *lex sportiva* is complete, we cannot have arrived at a global sports law correctly so called. Until then *lex sportiva* is a dangerous smoke screen justifying self-regulation by international sporting federations and the danger is that their customs and practices will be accepted as legitimate. *Quis custodiet ipsos custodes*?

NOTES

1. The vice-president of the IAAF (International Amateur Athletics Federation), explaining why they refused to recognise the US courts, in *Reynolds* v. *IAAF* [1992] 841 F.Supp 1444, 1452 (S.D. Ohio). Quoted in J.B. Jacobs and B. Samuels, 'The Drug Testing Project In International Sports: Dilemmas In An Expanding Regulatory Regime', *Hastings International & Comparative Law Review* 18 (1995), 557, 583.
2. J. Nafziger, 'Globalizing Sports Law' *Marquette Sports Law Journal* 9 (1999), 225, 237.
3. G. Teubner (ed.), *Global Law Without a State* (Andover: Dartmouth, 1997).
4. B. Houilhan, 'Governance, Globalisation and Sport', paper presented at Anglia Polytechnic University LLM Sports Law Seminar, November 1991.
5. Ibid.
6. P. Hirst and G. Thompson, *Globalisation in Question* (Cambridge: Cambridge University Press, 1999).
7. *Mendy* v. *IABA*; OG. Atlanta 006.
8. Ibid., para.7.
9. Ibid., para.8.
10. Ibid., para.11.
11. Ibid., para.13.

12. [2000] 173 ALR 665.
13. *AEK Athens & Slavia Prague* v. *UEFA* (Court of Arbitration for Sport 98/200; award 20/08/99) para.188.
14. Agreements are binding.
15. An agreement is abrogated when there is a fundamental change in circumstances.
16. M. Beloff, T. Kerr and M. Demetriou, *Sports Law* (Oxford: Hart, 1999); see also A. Caiger and S. Gardiner (eds.), *Professional Sport in the EU: Regulation and Re-Regulation* (The Hague: Asser Press, 2000), 301–3, where they write of a 'distinct lex sportiva'. Maclearn says that this is 'a term coined by the Acting General Secretary of Court of Arbitration for Sport, Matthieu Reeb, at the time of the publishing of the first digest of Court of Arbitration for Sport decisions stretching over the period from 1983-1998'. 'The court of arbitration for sport: an independent arena for the worlds sports disputes', *Valparasio Law Review* (2001), 379 at fn.11. Teubner, however, quotes a 1990 source, G. Simon, *Puissance sportive et ordre juridique etatique* (Paris: 1990), in idem, '"Global Bukowina": Legal Pluralism in the World Society', in Teubner (note 3).
17. Beloff, Kerr and Demetriou (note 16).
18. Ibid., 4.
19. Ibid., 5.
20. Ibid., 4.
21. Ibid., 5
22. Ibid., 217–20.
23. Ibid., 6.
24. There is a voluminous literature. Some starting points are H.-J. Mertens, 'Lex Mercatoria: A Self-Applying System Beyond National Law?', in Teubner (note 3); K.P. Berger, 'The New Law Merchant and the Global Market: A 21st Century View of Transnational Commercial Law', *International Arbitration Law Review* 3 (2000), 91; A.F.M. Maniruzzaman, 'The Lex Mercatoria and International Contracts : A Challenge for International Commercial Arbitration', *American University International Law Review* (1999), 657.
25. Mertens (note 24), 36.
26. Teubner (note 16), 15.
27. *Defrantz* v. *USOC* [1980] 492 F.Supp 1181.
28. Amateur Sports Act 1978, s.375(a).
29. D.J. Ettinger, 'The Legal Status of the International Olympic Committee', *Pace Yearbook of International Law* 4 (1992), 97, at fn.83.
30. *Cooke* v. *FA*, *The Times*, 23 March 1972.
31. *Reel* v. *Holder* [1981] 3 All ER 321.
32. A. Wise and B. Meyer, *International Sports Law and Business*, Vol.3 (Cambridge, MA: Kluwer Law International, 1998), 1478.
33. *Martin* v. *International Olympic Committee* [1984] 740 F.2d 670 (9th Cir.).
34. Although this assumption was questioned in *Modahl* v. *British Athletic Foundation*, No.2, unreported, 12 Oct. 2001. The Court of Appeal, by a majority, was able to find evidence that a contractual relationship had been established between an athlete and her national association.