Contestation and Justification of Private Transnational Authority.
The Case of Self-regulation by Sports Organizations

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Abstract
Institutions governing international public affairs are no longer of solely intergovernmental nature. During the past 20 years we have witnessed a growing transnationalization of global governance arrangements and a privatization of political authority in the sphere beyond the state. Often established in reaction to failure and contestation of intergovernmental regulatory regimes, transnational governance arrangements have themselves become sites of public contestation. This paper investigates (a) who are the actors addressing private transnational governance arrangements with demands and criticism, and (b) what are the normative grounds on which non-state authority beyond the state is contested? The goal is to empirically establish which criteria emerge as the dominant points of reference for legitimation in today’s era of transnational regulation. The case selected for the exploration of potentially general patterns of contestation addressed at transnational non-state authority are the regulatory arrangements governing the world of sports, more precisely: the transnational regulatory regime to prevent the use of performance-enhancing substances.

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1. Introduction

During the past 20 years we have witnessed a growing transnationalization of global governance arrangements and, going along with that, a privatization of political authority in the sphere beyond the state (see Cutler/Haufler/Porter 1999). Non-state actors participate directly in the setting and implementation of rules governing international affairs. The boundary between regulators and addressees of regulation becomes increasingly blurry as do old and traditional roles, interest configurations and alliances. In many fields, overlap and interconnection between public and private forms of ordering constitute the rule rather than the exception. The complex interplay among these is a challenge for any attempt to evaluate the nature and extent of authority and legitimacy beyond the state (Wolf 2008, 2012a; Schuppert 2011; Teubner 1997, 2000, 2010; Knill/Lehmkuhl 2002). On the one hand, state and interstate regulators still seem to be dominant as they can define the room for, provoke, condone or suppress non-state forms of regulation. On the other hand, in times of omnipresent co-regulation, state actors’ traditional repertoires of legitimation come under pressure. Under conditions of regulatory plurality, however, narratives of regulatory legitimation may have to redefine their purpose as well as their justifications.

Private governance institutions in the transnational sphere are interesting sites for observing the supposedly changing nature of discourse about legitimation and contestation of political institutions in the realm beyond the state. Often established in reaction to the failure of intergovernmental regulatory regimes, the political authority exercised in transnational non-state regulatory arrangements has itself become the target of contestation by diverse groups of actors, ranging from governments to media and non-state pressure groups. Against this background, the paper will explore the following questions: Who are the actors addressing private transnational governance arrangements with their demands and criticism? Do contestation and justification refer to similar normative standards in regard to non-state authority vs. state-based regulation? Assuming that claims to superiority of one over the other form of regulation often departed from differing criteria for supremacy – e.g. honouring democratic values vs. effective public good provision or defending public interests vs. defending private autonomy – we seek to establish whether the criteria and dominant points of reference for the contestation of political authority beyond the nation state have indeed changed in times of pervasive co-regulation. In other words,
are old and new forms of regulation contested on the grounds of the same normative yardsticks, or does the emergence of new forms of regulation go along with a general shift in regard to the normative criteria referred to in the legitimation and contestation of political authority?

We shall begin by discussing potential points of reference for the contestation and legitimation of state-based and non-state regulation in order to map the grounds on which the exercise of political authority beyond the state may be contested. To further clarify what normative yardsticks, if any, can be called into service to assess transnational private self-regulation, we shall also consider the need for justification of such self-regulation (Section 2). In the next section, the hybrid transnational governance regime regulating the prevention of the use of performance-enhancing substances in sports will be introduced to provide the empirical basis for the following exploratory analysis (Section 3). Therein, the example of sports law will be used to examine the grounds on which the private self-regulatory elements of a hybrid regulatory regime are contested by a diversity of agents. For this purpose, and in order to identify potential grounds for contestation, Section 4 will apply the criteria that were set out before to the academic debate about the pros and cons of the private regulatory arrangements governing the world of sports. In order to find out to what extent these general normative considerations are referred to as reference points in actual processes of contestation, a closer look will then be taken at the ongoing public controversy about the necessity of national anti-doping laws. The key finding will be that the normative standards that are applied in the actual contestation of the private elements of the hybrid regulatory regime that governs the world of sports do by no means reflect the full range of possible normative criteria provided by the academic debate, but are predominantly performance-oriented. In Section 5 conclusions are proposed about why states may be expected to be more successful in the contestation of private transnational authority than vice versa.

2. Points of reference for the contestation and legitimation of political authority

Before taking a closer look at the grounds on which the privatization of political authority is actually contested in the case of the self-regulatory transnational governance arrangements by sports organizations to co-ordinate anti-doping measures worldwide, some preparatory remarks may be helpful about the nature of private authority beyond the nation state. These remarks will be guided by general criteria for evaluating the legitimacy of political authority to which contestation (and justification) could principally refer. These normative standards will then be
employed for exploring the nature of the concrete contestation discourse taking place in the empirical case of the transnational governance regime regulating the prevention of the use of performance-enhancing substances in sports.

The most fundamental question that needs to be addressed in the first place in this context refers to the extent to which the private authority exercised in transnational self-regulatory regimes requires legitimation at all – and is therefore a legitimate target of contestation (Wolf 2012b; Dingwerth 2007; Take 2009). Let us take as a heuristically instructive starting-point the argument that private norm-setting need not, in principle, justify itself. Despite the misleading talk of a ‘lex mercatoria’, a ‘lex informatica’, or a ‘lex sportiva’, so it is indeed claimed by some authors, the modes of governance involved in transnational private self-regulation are located below the threshold of sovereign governance in the sense of exercising state-like legislative or executive power. Within the framework of voluntary commitments, there is no exercise of power in the narrow sense; there is simply use of the right to the collective exercise of individual autonomy. Private standard-setting is interpreted as ‘the free exercise of a fundamental right’ (Michael 2005: 435) to freedom of association as a constitutionally protected expression of civil liberty. Different from the generation and enforcement of collectively binding decisions based on the mandatory exercise of the sovereign authority of the state – the exercise of this freedom does not have to demonstrate its democratic legitimacy. The need for legitimation in the case of this classical exercise of state power is – it is claimed – fundamentally different from the need for (public) regulation in the case of ‘non-state self-regulation of public affairs’ (Collin 2011: 8) in which there is a risk of private abuse potentially detrimental to the common good.

According to this view, private norm-setting would not, in principle, need democratic legitimation. As an instance of the exercise of fundamental rights, it would, in theory, qualify for protection and would only require regulation, if at all, in cases where the exercise of private freedoms accorded at (inter-)national level was damaging to the public good or violated basic laws. The logical conclusion of this argument would be that the problem of transnational private self-regulation’s need for legitimation would dissolve into that of its need for regulation by the public sector, called upon in its capacity as guarantor. The only thing that needs democratic legitimation would be the authoritative exercise of state power via the political system on behalf of society. Private self-regulation, meanwhile, would be relieved of any requirement to justify itself, as long as there continued, in theory, to be the possibility of regulatory influence by the state. What
needs to be able to be justified is the granting, to private entities, of a share in legislative power, whether in the form of recognition-cum-recommendation of private standards by the state or in the form of legislative empowerment (Michael 2005:434-437). But the accountable entity is always the state, which has to justify the granting of scope for the exercise of liberal rights. This it can do, for example, by regulatory measures that incorporate private norm-setting into the constitutional set-up in such a way that the norm-setters, in exercising the freedoms granted to them, do not damage the public good or violate fundamental rights. Along this line of argument, the practical need for public intervention or non-intervention in private self-regulation will depend on the extent to which such regulation, in its capacity as an exercise of freedom liable to abuse, has already imposed effective limits upon itself to prevent any damage to the public good or violation of fundamental rights.

This kind of reasoning turns the tables on those who would question the legitimacy of private political authority as being inferior to that of (democratic) state-based authority. It calls upon them to justify state interference with civil liberty in the first place. Without questioning the general validity of this argument, some qualifications seem to be appropriate. As Michael (2005: 44) has rightly pointed out, ‘the fundamental division between public power and private freedom … cannot be maintained in the case of private standard-setters who utilize a putative freedom to exercise power’. In the transnational sphere, in particular, the dividing-lines between the public and the private exercise of power and control merge into one another in a multiplicity of hybrid manifestations of norm-setting and norm-enforcement. These all have the potential to breach fundamental rights or to fail to satisfy general-interest requirements and must therefore submit to measurement against the same input- and output-related yardsticks of legitimacy that apply to mandatory rule-making and rule-enforcement by the state.

We must ask, namely: Are regulatory objectives of a socially oriented kind being successfully achieved with an appropriate balance of costs and benefits (criterion of public-interest effectiveness and efficiency)? Are matters of public concern being addressed in a sustained and credible manner (responsiveness criterion)? Do the addressees of regulation, and others affected by it, have ways of successfully influencing the regulatory process (self-determination criterion)? Is it possible successfully to control the exercise of political authority and call its agents to account (accountability criterion)? In what follows, these questions and criteria (see also Flohr et al. 2010: 202ff; Dingwerth 2007; Take 2009) are used to specify the nature and extent of
contestation of the self-regulatory attempts by sports organizations to co-ordinate anti-doping measures.

3. Self-regulation by sports organizations

The sports world’s so-called *lex sportiva* is, alongside the lex mercatoria, constantly being cited as a model-example of autonomous societal self-regulation beyond the nation state.¹ Virtually every sports association has its own national and international system of rules and arbitral bodies, at the head of which stands the Court of Arbitration for Sports (CAS) in Lausanne. Long before the current global-governance discussion about the privatization of cross-border governance, the gradual evolution of private law in the world of sports was being cited as proof that a centralized state monopoly on power was not necessary in order to guarantee ‘public order, co-ordination and public goods’ (Burnheim as early as 1986: 221). Within the transnational nongovernmental bodies of the sports world, state functions are fulfilled by non-state actors who have the power to lay down binding rules and to impose sanctions where these are violated. The non-state institutions in which this takes place enjoy their own private authority whose claim to legitimacy is based on general acceptance by both the public and the actual addressees of the regulations, namely the athletes who make up the sports clubs and associations. An extensive privatization of the law, going well beyond a shift of the state’s monopoly on arbitration to the social sphere, therefore appears to have taken place in organized cross-border sports relations.

The use of performance-enhancing substances has become one of the major regulatory problems facing sports law. In 1999, in an attempt to tackle this, the World Anti-Doping Agency (WADA) was set up, in the form of a foundation in Swiss law.² The World Anti-Doping Code (WADC) adopted at the second World Anti-Doping Conference in Copenhagen in 2003 came into force in 2004. It was revised in 2007 and has been in force in its updated form since 1 January 2009.³ WADA describes its global anti-doping code as a ‘living document’.⁴ In the next edition, which

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¹ For a first overview of this empirical case, from which the following description draws, see Wolf (2012b).
² http://www.wada-ama.org/en/About-WADA/; last accessed 09.03.2013. The founding body is the International Olympic Committee (IOC) and the Foundation Board comes under the jurisdiction of the Swiss Ministry of the Interior.
will be presented in November 2013 and, if ratified, come into force in 2015.\(^5\) WADA aims at widening the battle against doping. Not only will the standard penalty be doubled (the punishment will be stiffened from the current two-year bans to four-year suspensions), but the new code is one ‘for the entourage as well – picking up the coaches, agents and physios.’\(^6\) In addition, and for the first time, it should also give WADA the capability to undertake its own investigations.


The approach to governance

The.particular.self-regulation.involved.here.in.very.great.measure.assumes.state.functions.and.replaces.state.regulation. With.its.World.Anti-Doping.Code,.the.system.of.control.associated.with.this,.and.the.international.Court.of.Arbitration.for.Sports,.WADA,.sponsored.by.sports.associations.and.the.Olympic.movement,.is.not.only.viewed.as.the.‘international.police-force.of.high-level.sports’\(^7\); it.gives.the.appearance.of.transcending.all.(sporting) sectors.and.acting.as.private.law-maker.and.judge. Moreover,.private.self-regulation.in.sports.seeks.to.achieve.compliance.through.the.threat.of.sanctions.and.not,.for.example,.through.‘softer’ forms.of.control.such.as.exchange.of.information,.persuasion,.or.learning-processes.

Not one of the sporting world’s international associations owes its existence or its scope for action to an international agreement in which the public sector devolves what were originally


\(^7\) http://www.nzz.ch/nachrichten/politik/international/wada_antidoping_1.3990996.html; last accessed 09.03.2013.
state competencies to the private sector or transfers state functions to it. There is therefore neither an officially decreed nor a negotiated instance of self-regulation here. In the absence of a mandate by the state or the community of states, the accepted benchmark when it comes to the exertion of influence by these is freedom of association, which generally enjoys constitutional protection (see also Haas 2004). It imposes clear limits on state intervention and restricts the remaining isolated rights of intervention to the protection of basic freedoms and the rectification of any anti-competitive effects of private self-regulation (Reissinger 2010: 135).

The role of the state must thus therefore be described as limited and non-proactive, as ‘complementing’ rather than ‘supplanting’ (Haas 2004). Nonetheless, it is a significant one: ‘national and international legal norms guarantee sport a regulatory power that allows it to set its own rules. Sport is not a state with its own decision-making powers or competence-competence. Its regulatory authority is not inherent; it is a competence derived from states or communities of states’ (Nolte 2012: 116).

The legal status of the WADA as an entity in Swiss law, and the terms providing for half the WADA budget to be financed from the public purse, in themselves constitute a form of state back-up of the regulatory initiatives in the anti-doping sphere. The WADA’s sports court – the CAS – answers to the Swiss Federal Court, before whom its decisions may be challenged. These decisions are therefore subject to the laws of the country in which the court is based – Switzerland. States may not sign up to the Code. Instead, the anti-doping regulations of the various sporting associations are generally incorporated into international agreements. The sporting associations’ codes were first recognized by the world of states in the Copenhagen Declaration on Anti-doping in Sport, which was adopted in 2003 at the intergovernmental conference of the same name and was ratified by virtually every state in the world. By means of this declaration of moral and political commitment, the ratifying states affirmed their commitment to the provisions of the WADA code and undertook both to support their national anti-doping organizations in implementing it and to gear their own anti-doping measures to it. Sporting organizations ‘that are not in compliance with the Code or applicable anti-doping rules adopted pursuant to the Code’ will lose all or part of their state funding. This represents not only

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9 The Council of Europe’s 1989 Anti-Doping Convention had already established ‘that public authorities and the voluntary sports organisations have complementary responsibilities to combat doping in sport’ (http://conventions.coe.int/Treaty/en/Treaties/html/135.htm; last accessed 10.03.2013); see also Reissinger 2010: 153 ff).
a recognition, through juridification, of private standard-setting in (international) law but also, conversely, a self-imposed undertaking by states to adhere to regulation created by private actors.

In October 2005 in Paris the 33rd session of the UNESCO General Conference adopted the International Convention against Doping in Sport. It was the first-ever unified and globally binding international complex of anti-doping regulations and it came into force in 2007.\textsuperscript{11} It is largely based on the 2003 version of the WADC and supplements the latter with a commitment by the signatory states to institute suitable legal or other anti-doping measures within their own area of jurisdiction. This indirect commitment on the part of the state, through the incorporation of private standards into international agreements, complements the shadow which state law casts over transnational private sports regulation with a remarkable ‘counter-shadow’ of private self-regulation over the state (cf. Héritier/Lehmkuhl 2008). This inter-meshing of shadow and counter-shadow emerges particularly clearly in Art. 22 of the WADA Code (‘Involvement of Governments’): ‘Each government’s commitment to the Code will be evidenced by its signing the Copenhagen Declaration on Anti-Doping in Sport of March 3, 2003, and by ratifying, accepting, approving or acceding to the UNESCO Convention.’ (World Anti-Doping Agency 2009: 113). The intention is thus that, via the two international agreements, the signatory governments will indirectly pledge themselves to support the provisions of the privately instituted WADA Code and bring all other state-instituted anti-doping measures into line with it.

The upshot of all this is a highly complex inter-play of private and public co-regulation (Becker/Lehmkuhl 2003), with numerous interactions between, on the one hand, the rules generated by self-regulation and, on the other, the standards set by national and international law. The autonomy of private self-regulation in the sporting world, whilst being underpinned in international law and complied with at national level, is also restricted. The ‘activation of freedoms’ reflected in private norm-setting and norm-enforcement therefore does not take place in a space where fundamental rights do not figure. The exercise of private transnational authority clearly operates in a space afforded by national and international law. Nolte is to be agreed with when he states that ‘the “autonomy of sport” plainly only operates within the framework accorded to it by (inter-)national law’ (Nolte 2012: 117). The safety-net function at the (inter-)national level is clearly still present. The state ‘monitors for abuse’ (Läier 2006) by exercising guarantor and safety-net functions: ‘Sport assumes primary responsibility for safeguarding the sports ethos. … It prohibits doping by means of its own system of rules, punishes violations via

its own sports-based judicial procedures, thus defending the sports associations’ principle of fair play against attack. The state provides a legal framework for this. In doing so, it assumes a secondary guarantor function’ (Nolte 2012: 8).

The anti-doping measures enshrined in the WADA code reflect complex interconnections between private self-regulation and the public fabric in which this is embedded. The functional division of labour between public regulation and private self-regulation in this area is based on the autonomy of sporting organizations, assured by international law and operating within the framework of international agreements. This does not exclude the possibility of norms relevant to sport also being incorporated into (inter-)national laws, or, where such norms already exist as part of current state legislation, of the law requiring adaptive measures to be taken. It is true that higher-order inputs to governance also take place via the self-regulation route. Thus, constitutional-style ‘rules for rule-making’ may very well also form part of transnational private self-regulation initiatives and codes of conducts within sport itself. However, such rules remain theoretically subject to public monitoring for abuse – irrespective of whether such monitoring is adequately exercised or not (for a critical evaluation see Haas 2004). But here again the spheres of public and private regulation are closely intermeshed – in judicial or arbitration proceedings, for example. One of the major contributions of public regulation consists in scrutinizing and monitoring private norm-setting and norm-enforcement to ensure their compatibility with fundamental rights and freedoms. It does this by applying ‘the yardstick of national and international freedoms and constitutional criteria to the structures and rulings of sporting bodies’ (Lehmkuhl 2004: 191).

4. Grounds and agents of the contestation of private authority regulating the prevention of the use of performance-enhancing substances in sports

Potential normative reference points for contestation: the academic debate

In Section 2, public-interest effectiveness and efficiency, responsiveness, self-determination, and accountability were introduced as general criteria on which the contestation of political authority could be based. These criteria will structure the exploration of the following questions: First, how does the lex sportiva's balance-sheet look in relation to these normative criteria? To answer this question we will take a closer look at the academic debate about the pros and cons of the transnational governance regime regulating the prevention of the use of performance-enhancing substances in
sports. And second, *to what extent are these criteria referred to as reference points in the actual political contestation of this regulatory arrangement?* This question will be explored by taking a closer look at the ongoing political dispute about the necessity of national anti-doping laws.

**Public-interest effectiveness and efficiency**

The link between anti-doping regulations and the common good seems a given in the context of health-protection, the merit principle, and equality of opportunity. The value of these objectives is also recognized by the state – for example, when the German government, in its Report on Sports, describes sport as a cornerstone of social well-being and as one of the major sources of social capital and public health (Haas 2004). The relevance to the common good which the private regulators ascribe to themselves thus acquires added legitimation from the state.

In trying to assess the effectiveness and efficiency of anti-doping measures, one could criticize the effectiveness hampering unintelligibility of the regulatory landscape. Existing alongside the CAS are the judicial procedures of the international sporting associations, not all of which are contractually bound to the CAS and which provide for their own courts of final appeal. Some countries have national anti-doping laws, others not. The problem of duplicate competencies is further aggravated by the fact that the WADC has to be translated into national codes – compatible in each case with the law of the respective state – and only takes effect when these are applied at the national level (Kotzenberg 2006: 30 f.). In this process, varying legal standards are used according to the country involved, to the detriment of a unified application of the rules. The results of all this are legal uncertainty and never-ending procedures as participants engage in ‘forum shopping’ (cf. Kotzenberg 2007: 145 ff.; Lehmkuhl 2004: 179, 192).

A further reference point for contestation in regard to efficiency results from WADC’s weak powers of implementation: so far there is no provision for fact-finding instruments over and above the mechanisms for controlling doping amongst athletes. In this connection, Haas (2004) points in particular to the gap resulting from the fact that, in its present version, the Code does not extend to the athletes’ immediate circle – in other words, their trainers, advisors, and physicians. The Code establishes no power to order searches or confiscations. Furthermore, the existing regime’s focus on the athletes as the actual addressees of regulation has neither prevented the widespread use of banned substances nor the growing trade of these substances and the increasing role organized crime plays in this market.
Responsiveness, self-determination, and accountability

The responsiveness criterion measures the legitimacy of a particular regulatory approach by asking how sustained and credible it is in dealing with issues that are of public concern. There is no doubt that the ban on doping has addressed an issue of public concern in a sustained and credible manner. This remains the case even if one of the primary motivations for the ban on doping was probably the economic interest to restore a level playing-field – for the sake of athletes, but also for the sake of their sponsors, following the equally relevant commercialization of sporting activity. However, one ‘equity gap’ could be addressed here, namely that whilst sanctions can be imposed on athletes for violations of the WADC rules, there is no provision for compensation for the disadvantaged co-competitors. This gap is highlighted by Haas (2004) under the rubric ‘justice for victims’.12

By contrast, when one considers the individual athletes in their capacity as the actual addressees of the regulations, application of the legitimatory criteria of self-determination and accountability reveals a number of deficiencies that could be targeted by contesters – particularly in the case of self-determination. Thus, prior to any Olympic Games, the International Olympic Committee, the various national sports associations, and all the athletes are required to give undertakings that they will not have recourse to any other means of legal redress, including their national jurisdictions. Lehmkuhl sums this situation up nicely by observing that ‘the capacity of transnational associations to impose obligations on individual athletes … contrasts sharply with the minimal extent to which athletes share in the creation of transnational regulations’. Their opportunities for participation, he says, ‘tend to zero’ (Lehmkuhl 2004: 183). Contestation could address the remarkable lack of democratic participation reflected in the discrepancy between the athletes as the authors of transnational regulation and the athletes who are subjected to it and who have to seek access to national courts necessary to protect basic individual rights against arbitrary decisions. Against this background lawyers have described the lex sportiva as a form of ‘authoritarian rule of monopolist associations’ (Röthel 2007: 758, quoting Reuter 1996).

Even the voluntary nature of individual consent to the sporting associations’ rules is not regarded as a real counter to the imbalance between, on the one hand, the opportunities open to the regulatory subjects to influence the rules that apply to them and, on the other, the grave

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consequences of decisions made on the basis of those rules, or even simply of a refusal to submit oneself to the relevant regulatory regime.

Can the actors who establish and enforce the rules within the framework of private sports-regulation be effectively controlled and called to account by the subjects of that regulation? Measured against this criterion, and if one accepts Lehmkuhl’s further finding of lack of transparency in the establishment of transnational rules, the legitimatory picture becomes even gloomier. Whereas an athlete may be forced to resort to the courts to safeguard a whole range of individual rights, the only ground on which private sports regulators may be brought to court is violation of their own rules.

When independent sports organizations violate fundamental rights they do not do so from a space where such rights do not figure (cf. Lüer 2006:197); in fact they operate under the shadow of public institutions established to protect these rights. This was made particularly clear by the conduct of the European Court of Justice in a number of cases dealing with individual actions against sporting associations. In what has come to be known as the ‘Bosman ruling’, for example, the European Court of Justice directed that ‘The abolition as between Member States of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law.’ That said, the European Court of Justice ‘excepts “purely sports-related” decisions based on “purely sports-related regulations” from its scrutiny in matters relating to fundamental freedoms’ (Röthel 2007: 757). In this regard potential grounds for contestations could address the tension between the protection of the individual’s right to self-determination one the one hand, and the protection of the autonomy of the societal sphere, notably the freedom of association, on the other (Nolte 2012: 2).

The contestation of transnational private authority in practice

This brief account of critical points that have been raised against transnational private self-regulation in the sporting world by scholars from law and political science has highlighted a broad range of normative demands which the contestation of the transnational governance regime regulating the prevention of the use of performance-enhancing substances in sports could

potentially use as reference points. But in how far and to what extent are these different normative criteria also reflected in the actual processes of contestation? Owing to the exploratory nature of this paper, this question can only draw on selective empirical evidence based on a first and preliminary screening of the ongoing public contestation of the role of private authority in regulating the prevention of the use of performance-enhancing substances.

Against the background of the relatively broad range of criteria that can be found in the academic debate about the pros and cons of the substantial role private transnational authority plays in this field, and taking into account that exercise of private authority is generally criticized for not meeting the demands of democratic legitimacy in a sufficient manner, it is somewhat surprising that its contestation is almost exclusively referring to arguments relating to its effectiveness. The defence of private transnational regulation resorts to the same line of arguments rather than justifying the autonomy of sports with reference to human rights, such as the protection of the autonomy of the societal sphere, freedom of association (Nolte 2012: 2). Neither is there any hint at the subordinate nature of the state in relation to societal responsibility which could be argued by following the principle of subsidiarity; and the limitation of the state’s responsibility to guaranteeing the freedom of association.

Among the arguments that are brought forward by the anti-doping movement in the actual public debate the lack of democratic legitimacy of the alleged ‘authoritarian rule of monopolist associations’ referred to in the academic discourse does not play any role. Instead, the lack of effectiveness of the private transnational rule system for the prevention of the use of performance-enhancing substances plays center stage. The main protagonists of contestation can be found among athletes, as the immediately affected victims of cheating competitors, among critical chief representatives of the World anti-Doping Agency itself, who sharply criticize the ineffectiveness of the existing regulatory system, accuse certain sports federations of not taking the combat of doping seriously enough, and who call on states to play a more active role therein. In addition to these non-state agents of contestation a number individual Governments who have implemented or are in the process of implementing national anti-doping laws can also be considered as relevant members of this movement. In Germany, the Bavarian Ministry of the Interior has taken a lead in this campaign, advocating national anti-doping legislation which criminalizes cheating in sport.14

14 http://www.bayern.de/Pressemitteilungen-.1255.10387859/index.htm; last accessed 19.08.2013.
Driven by similar concerns, WADA Director General, David Howman, describes the regulatory problem as ‘getting too big for sport to manage’. In regard to the failure to prevent the widespread use of banned substances he explicitly refers to a culture of cheating, to the explosion of the trade of these substances and its links to global organized crime. While sports federations are accused by the anti-doping movement of not doing not more than the bare minimum, the state is called upon to control the negative externalities which affect public affairs way beyond sport, such as public health, the economic interests of victims of users of banned substances. ‘Unless we make something mandatory, people won’t do it.’

Public prosecutors and the detection methods of the state are needed to summon witnesses, to conduct searching, to tap telephones, or to confiscate drugs. While self-regulation may be capable of preventing and punishing ‘dirty victories’ by imposing suspensions and the disqualification of results in an event during which an anti-doping rules were violated, no effective punishment and prevention of ‘dirty money’ is considered possible without the help of the state as the only actor who can protect the interests of affected outsiders (Kauerhof 2007: 75). Coaches, agents and physiotherapists whose athletes have tested positive for banned substances are beyond the realms of Wada’s punishment and, as WADA President John Fahey pointed out, only national anti-doping are in a position to ‘catch the cheats behind the cheats’. In short, the controversy is one about the ‘most effective way’ to combat the use of banned substances.

As expected, the grounds on which the private transnational regime is defended and the need for state-based anti-doping laws rejected do not bring into play normative ideals, such as the protection of the autonomy of the societal sphere, but take up the criticism raised by the anti-doping movement by arguing on the basis of the same effectiveness-related criteria. A full account of these arguments was present in the controversial debates during the December 2012 meeting of the German Olympic Sports Confederation (DOSB) when only 25 out of 459...
delegates voted in favour of national anti-doping-law legislation in Germany. The defenders of sport’s claims to self-regulation predicted a bleak future with long public law suits. Because sports courts can suspend already in cases of reasonable suspicion, whereas public courts cannot (Kauerhof 2007: 73), they could guarantee a much quicker punishment. Furthermore, as an undesired effect, expensive damage suits brought to public courts against sports’ own courts might influence sports’ courts decisions. A daunting picture was painted of national anti-doping laws ‘that vary from country to country, and sport to sport, which would be a return to the dark ages of anti-doping and a problem which existed during your time as an elite athlete. It would result in athletes in different sports or from different countries receiving different bans for the same offences, and even worse athletes from the same sport receiving different penalties depending on the country they competed for.’

With all caution, these random sample of arguments exchanged in the actual process of contestation suggests a discrepancy between, on the one hand, the broad range of normative criteria referred to in the academic debate about the pros and cons of regulatory regimes based on private transnational authority in the world of sports and, on the other hand, the one argument (‘Improve effectiveness!’) which clearly dominates the actual contestation process. In this controversy, even arguments that aim at preserving the world of sports as an autonomous societal sphere justify themselves with reference to the presumably better achievement potential and are not grounded on the normative reference points known from discourses about human rights and democracy, such as the right to associate or the protection of societal spheres from being suffocated by the state. Do these criteria represent concerns which may still be well established in academia but become less important in ‘real life’, where output- rather than input-based deficit perceptions have established themselves as the main causes for criticizing political institutions (on this, see also Ecker-Ehrhardt/Zürn 2013)?

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22 In a similar context, Ecker-Ehrhardt and Zürn (2013: 337) introduce an instructive distinction between the politicization of legitimacy deficits on the one hand and the politicization of regulatory deficits on the other hand.
5. Why states can be more successful agents in the contestation of private transnational authority than vice versa

Cross-border governance entails neither ‘global law without a state’ (Teubner 1997) nor ‘governance without government’ (Zürn 1998: 170f; Rosenau/Czempiel 1992; Risse 2011). Private self-regulation always takes place in the shadow of (inter-) state regulation and in principle is therefore also always regulable. If we view the international system as a state-based political order in which the world of states continues to be the only locus of competence in regard to the allocation of regulatory competencies to other – e.g. private – actors, non-state transnational authority should – at least in principle – be easy prey for contestation by states. In such a context, societal regulatory arrangements are structurally weak because they can be overruled, overridden, abrogated by state-based regulation. Possession of the power to empower or disempower marks a fundamental distinction between the members of the world of states and the members of the transnational sphere, and it also raises the expectation that states’ prospects for a successful contestation of private transnational authority are systematically higher than vice versa.

Private transnational norm-setting and norm-implementation in the world of sports is, without a doubt, indicative of a general proliferation of loci of norm-production. However, these loci lie within the shadow of a higher-order body of regulations/regulatory powers at the inter-state level and do not seriously call into question inter-state competence in the matter of the creation of the conditions for such private norm-production. Hence, what appears to, and is alleged to, develop ‘naturally’ in fact takes shape not in a world-wide pre-constitutional ‘state of nature’ but within the existing political order of the world of states within which the production of norms by private actors is embedded. In this set-up, states are still actors – the only actors – with the ultimate power to confer powers, to grant or deny authority and regulatory competence to non-state actors (on an essentially unilateral basis internally and multilaterally between each other). States can – at least in theory – intervene at any moment to determine the conditions governing private norm production. There is no private self-regulation that is not also regulated self-regulation. (on this, see Schuppert 2001 and Collin 2011). This makes states strong agents of contestation when it comes to addressing demands and criticism and implement remedies vis-à-vis the exercise of political authority by non-state actors. Due to its exclusive competence to allocate (and withdraw) regulatory competences to private regulators, the state ultimately determines the degree of autonomy it is willing to grant to private associations. When the private self-regulatory
arrangements governing the world of sports prove ineffective to prevent the spread of organized crime and give rise to fraud with economic implications far beyond the world of sports’ ambition to safeguard fair competition (Kauerhof 2007: 72, 75), states can – and have to - intervene to prohibit, abrogate or overrule ineffective non-state regulatory regimes. The case of private self-regulation in sports presented here confirms the state’s indispensable guarantee function, most importantly ‘as regards safeguarding the security of affected third parties’ (Röthel 2007: 763).
Bibliography


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