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Sports' Global Anti-Doping Regulatory Regime: The Challenges and Tensions of Polycentricity and Hybridity

ERIC L WINDHOLZ*

Sport has developed a global anti-doping regulatory regime of great sophistication. It is polycentric — operating at both the national and international level — and hybrid — combining contractual, criminal and administrative tools with public and private enforcement mechanisms. The regime is not without its challenges and tensions, however. Functional, democratic and normative challenges abound. There also are tensions that arise from nesting private transnational regulatory regimes in public domestic legal structures. This article critically examines these challenges and tensions using the Essendon Football Club v Australian Sports Anti-Doping Authority as its case study. That case considered the legality and propriety of the Australian Football League collaborating with the state's anti-doping regulatory authority to investigate alleged anti-doping rule violations in breach of the World Anti-Doping Code. This case illustrates the challenges that arise when the interests of players, clubs, competition administrators, national regulators, and sports' global guardians, do not align. The article establishes that while sports' global anti-doping regime has proven itself to be functionally stable, opportunities exist to broaden the regime's democratic credentials to give other stakeholders a more meaningful voice. Doing so would not only improve the regime's sense of fairness and justice, it also might improve its effectiveness.

I Introduction

There has always been doping and doping control in sport. Reports exist, for example, of the use of hallucinogenic mushrooms during the ancient Greek Olympics to enhance athletic performance, and use by the authorities of the time of the death penalty to prohibit such

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practices.¹ Since then, both the nature of doping and the means by which it is sought to be prohibited have evolved extensively. Today, a vast variety of substances and methods are employed to gain an unfair advantage on the sporting field, as evidenced by the list prohibited by the World Anti-Doping Code ('Code').² And the Code is but one part of a sophisticated global regulatory regime put in place to prohibit their use. That regime includes international and national sporting federations that require athletes, clubs and officials participating in their competitions to comply with the Code; the World Anti-Doping Agency ('WADA') that promulgates the Code and administers it with the assistance of a network of national anti-doping agencies; and the Court of Arbitration for Sport ('CAS') that adjudicates disputes arising under it.

Sports' global anti-doping regime is an example of what regulatory scholars describe as a polycentric and hybrid regulatory regime: international and national; centred and decentred; public and private; and combining contractual, administrative and criminal law tools. Regulatory theory tells us that numerous advantages attach to regimes that are polycentric and hybrid. Regulatory models such as smart regulation, regulatory governance, regulatory capitalism and regulatory orchestration extol the virtues of bringing together different actors' resources, knowledge, skills and expertise, and combining them in a complimentary and synergistic manner tailored to the causes and context of the issue at hand.³ However, these models also tell us that polycentric and hybrid regulatory regimes are not without their challenges and tensions. Functional, normative and democratic challenges abound. There also are tensions that arise from nesting private transnational regulatory regimes in public domestic legal structures.⁴

This article examines sports' global anti-doping regulatory regime through the lens of regulatory theory to better understand these challenges and tensions. To date there have been comparatively few attempts to apply regulatory theory's understandings of polycentricity and hybridity to the regulation of international sports. This has been an

¹ Rudhard Klaus Müller, 'History of Doping and Doping Control' in Detlef Thieme and Peter Hemmersbach (eds), *Doping in Sports: Handbook of Experimental Pharmacology* (Springer, 2010) vol 195, 1. See also Charles E Yesalis and Michael S Bahrke, 'History of Doping in Sport' (2002) 24(1) *International Sports Series* 42.

² World Anti-Doping Agency, *The World Anti-Doping Code (2021)* (Web Page) <www.wada-ama.org>.

³ Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998); Martin Minogue and Ledivina V Cariño, *Regulatory Governance in Developing Countries* (Edward Elgar, 2006); David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *Annals of the American Academy of Political and Social Science* 12; Kenneth W Abbott et al, 'Two Logics of Indirect Governance: Delegation and Orchestration' (2016) 46(4) *British Journal of Political Science* 719. These (and other) models are expanded upon and explained in Part 2 below.

⁴ These advantages and disadvantages are expanded upon and explained in Part 2 below.

opportunity lost. Regulatory theory provides a rich literature that is highly relevant to understanding the nature, dynamics and challenges of sports' anti-doping regime. Regulation has undergone fundamental change over the past forty years. Globalisation has seen regulation move beyond the state. In the past forty years, we have witnessed attempts to develop systems of global governance and transnational legal and regulatory regimes to address issues that know no borders. These issues range from the economic to the social — from international trade and investment, to public health, environment protection, and human rights.⁵ Regulation today is both more diverse and increasingly complex, with regulatory functions being undertaken by a variety of different actors (state and non-state; public and private) across multiple sites (local, national and international) and through a variety of different mechanisms (rule based and non-rule based).⁶ Sports' global anti-doping regime is emblematic of this change. Examining it through the lens of regulatory theory offers the prospect of fresh perspectives and insights to enhance our understanding of both the anti-doping regime specifically, and sports transnational regulatory order more broadly.

This article proceeds in four substantive parts. Part 2 explains the regulatory lens through which sports' anti-doping regulatory regime will be examined. Part 3 then examines sports' global anti-doping regime. Its key features are identified, and its polycentricity and hybridity highlighted. Part 4 then specifically examines Australia's national regime using the 2014 case of the *Essendon Football Club v Australian Sports Anti-Doping Authority* as its case study. This case highlights the tensions inherent in both its hybridity and polycentricity. Part 5 then discusses the challenges of global polycentricity and hybridity more broadly.

II Regulation and Regulatory Regimes: Polycentricity and Hybridity

The concept of regulation has expanded over the past forty years. In recognition that traditional state-centric, top-down, law-based regulatory models are too narrow and limited to deal with increasingly

⁵ For a discussion and illustration of the breadth and depth of issues the subject of global or transnational regulatory arrangements, see Thomas G Weiss and Rorden Wilkinson (eds), *International Organization and Global Governance* (Routledge, 2nd ed, 2018).

⁶ Eric L Windholz, *Governing through Regulation: Public Policy, Regulation and the Law* (Routledge, 2018) 27 ('Governing through Regulation'). See also Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(2) *Regulation & Governance* 137 ('Constructing and Contesting Legitimacy'); Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54(1) *Current Legal Problems* 103 ('Decentring Regulation'); Christine Parker, 'The Pluralization of Regulation' (2008) 9(2) *Theoretical Inquiries in Law* 349.

complex social and economic issues, regulatory approaches have broadened to include actors and instruments that extend beyond the state and the law. As Black observes, government is no longer the sole locus of regulatory activity. Rather, regulatory roles increasingly are undertaken by a range of non-state actors at the national, supranational and global levels.⁷ These non-state actors can include business and organised labour, experts and professionals, public interest groups and international organisations.⁸ Nor is regulation today confined to laws coercively enforced by the state. Freiberg, for example, identifies five sets of regulatory tools, in addition to legislation: economic, transactional, authorisation, informational and structural.⁹ And Windholz observes that coercion is but one of the levers available to regulators to change behaviours, and that they also incentivise, persuade, assist and even nudge people to achieve compliance.¹⁰

As regulation grew in complexity, variety and diversity, numerous commentators sought to develop conceptual models to describe this new regulatory world, and the opportunities and challenges it presents. The idea of the ‘regulatory state’ began to give way to broader conceptions that did not automatically position the state at the centre of the regulatory endeavour. Black, for example, spoke of both ‘decentered’ regulation to draw attention away from the state as the central regulatory actor, and ‘polycentric’ regulation to draw attention towards multiple (sub-national, national or transnational) sites of regulation.¹¹ Grabosky similarly referred to regulatory systems comprising multiple overlapping ‘webs of influence’ of which governments are but one (albeit important) regulatory actor.¹² Minogue and Cariño, on the other hand, employed the term ‘regulatory governance’ to capture the idea that for new and complex issues to be addressed effectively, one must go beyond formal rules to broader frameworks that involve the collaboration of a range of non-state actors;¹³ and Levi-Faur coined the term ‘regulatory capitalism’ to describe a world in which the state, civil society, business and the professions cooperate and combine to produce hybrid forms of regulation employing new regulatory technologies: in which ‘statist

⁷ Black, ‘Decentering Regulation’ (n 6); Black, ‘Constructing and Contesting Legitimacy’ (n 6).

⁸ John Braithwaite, Cary Coglianese and David Levi-Faur, ‘Can Regulation and Governance Make a Difference?’ (2007) 1(1) *Regulation & Governance* 1. See also Shauhin Talesh, ‘Public Law and Regulatory Theory’ in C Ansell and J Torfing (eds), *Handbook on Theories of Governance* (Edward Elgar, 2016) 102.

⁹ Arie Freiberg, *Regulation in Australia* (The Federation Press, 2017). See also Lester M Salamon (ed), *The Tools of Government: A Guide to the New Governance* (Oxford University Press, 2002).

¹⁰ Windholz, *Governing through Regulation* (n 6) 170–82.

¹¹ Black, ‘Constructing and Contesting Legitimacy’ (n 6).

¹² Peter N Grabosky, ‘Using Non-Governmental Resources to Foster Regulatory Compliance’ (1995) 8(4) *Governance* 527–50.

¹³ Minogue and Cariño (n 3).

regulation co-evolves with civil regulation; national regulation expands with international and global regulation; private regulation co-evolves and expands with public regulation; voluntary regulations expand with coercive ones; and the market itself is used or mobilised as a regulatory mechanism'.¹⁴

Central to all these notions is that regulation is not a single instrument, is not undertaken by a single actor, and is not static. Rather, regulation involves multiple activities, undertaken by a network of actors, and is systematic. This brings us to the concept of the 'regulatory regime'. A regulatory regime refers to the network of actors involved in regulating an issue, the aggregate activities undertaken by them to achieve the desired outcome, and the decision making systems through which those activities are coordinated.¹⁵ Thinking in terms of regulatory regimes allows for a variety of different actors and instruments combining to produce a variety of different regulatory schemes, from government regulation at one end of the spectrum, through models of hybrid, co- and polycentric regulation, to private or self-regulation at the other end of the spectrum. But in a regime these combinations do not occur by chance. A central idea behind a regulatory regime is that it is coordinated — steered and directed (to employ governance parlance). The importance of coordination has given rise to the concept of 'regulatory orchestration', a colourful metaphor that speaks to the mobilisation and harmonious coordination of regulatory intermediaries in the governance task.¹⁶ And, of course, every orchestra needs its conductor. Traditional conceptions of regulatory regimes saw government as the conductor, steering and directing the other regulatory actors, but the recent expansion of regulatory models has shown us that is not always the case. Private and civil-society organisations also can be the conductor and coordinator. And finally, thinking about regulation as a regime focuses our attention on the systematic nature of regulation and, in particular, on the three main roles of the regulatory process —

¹⁴ David Levi-Faur, 'Regulation & Regulatory Governance' (Jerusalem Papers in Regulation & Governance Working Paper No 1, February 2010) 24. See also Levi-Faur (n 3) 12; John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar, 2008).

¹⁵ Windholz, *Governing through Regulation* (n 5) 74–5. For variations on this theme, see David Levi-Faur, 'Regulation and Regulatory Governance' in D Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 3, 13; Christopher Hood, Henry Rothstein and Robert Baldwin, *The Government of Risk* (Oxford University Press, 2001) 9; Colin Scott, 'Regulating Everything' (Discussion Paper No 24/2008, Geary Institute for Public Policy, University College Dublin, 26 February 2008) 7.

¹⁶ Kenneth W Abbott and Duncan Snidal, 'International Regulation without International Government: Improving IO performance through Orchestration' (2010) 5(3) *Review of International Organizations* 315; Kenneth W Abbott et al (n 3) 719. See also Kenneth W Abbott, David Levi-Faur and Duncan Snidal, 'Introducing Regulatory Intermediaries' (2017) 670(1) *Annals of the American Academy of Political and Social Science* 6.

rule-making, rule-administration and rule-enforcement.¹⁷ And as Levi-Faur et al point out, different approaches can be taken to each of these roles (or even only part of them) with the result that regulatory regimes might include a hybridity of actors, functions and instruments across different roles.¹⁸

The opportunities that come from thinking of regulation in terms of hybrid, polycentric and networked regulatory regimes are many. Bringing different actors' different resources, knowledge, skills and expertise to the regulatory endeavour creates opportunities for imaginative and complimentary combinations of regulatory actors and instruments tailored to the causes and context of the issue at hand, which Gunningham and Grabosky advise is the key to 'smart regulation' and designing better regulatory regimes.¹⁹ They also bring scale to implementation. Many hands make light work. Moreover, they offer the promise of stability to the management of complex problems and issues. Hybrid systems 'structurally couple' actors with different interests, values and perspectives within political and legal institutions and sanctioned routines that both enable the problem or issue to be approached from multiple perspectives and make unilateral action and hostile takeovers less likely.²⁰

However, there also are challenges. Black, for example, identifies three challenges inherent in polycentric and hybrid regulatory regimes: functional, normative and democratic.²¹ Levi-Faur, Kariv-Teitelbaum and Medzini similarly describe these challenges as the effectiveness challenge, the value of justice challenge and the democratic control challenge.²² The functional (or effectiveness) challenge revolves around the problems of coordination and accountability. Many hands also can pose a problem.²³ How do you coordinate a polycentric

¹⁷ Regulation is a highly contested concept. While 'rules' are central to legal conceptions of regulation, other disciplines adopt broader and more plural conceptions of regulation. When viewed from a broader governance and policy perspective, regulation also includes non-rule-based mechanisms designed to achieve behaviour change such as standards and soft norms, and other governance and policy tools such as taxation, subsidies, redistribution, and information and persuasion. For a brief overview of different conceptions of regulation see Levi-Faur, 'Regulation & Regulatory Governance' (n 14) 5.

¹⁸ David Levi-Faur, Yael Kariv-Teitelbaum and Rotem Medzini, 'Regulatory Governance: History, Theories, Strategies, and Challenges' (2021) *Oxford Research Encyclopedia of Politics* (Web Page, 7 October 2021) <<https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1430>>.

¹⁹ Gunningham and Grabosky (n 3).

²⁰ GCM Teubner, 'Autopoiesis and Steering: How Politics Profit from the Normative Surplus of Capital' in Roeland J In 't Veld et al (eds), *Autopoiesis and Configuration Theory: New Approaches to Societal Steering* (Kluwer Academic, 1991) 127, 133. See also Ulrik Wagner, 'The World Anti-Doping Agency: Constructing a Hybrid Organisation in Permanent Stress (Dis)Order' (2009) 1(2) *International Journal of Sport Policy and Politics* 183, 193–4.

²¹ Black, 'Constructing and Contesting Legitimacy' (n 6) 140–1.

²² Levi-Faur, Kariv-Teitelbaum and Medzini (n 18).

²³ DF Thompson, 'The Moral Responsibility of Public Officials: The Problem of Many Hands' (1980) 74(4) *American Political Science Review* 905.

regime's many (and otherwise autonomous) parts to ensure its effectiveness? How do you prevent fragmentation and disharmony? The greater a regime's polycentricity, the more difficult coordination becomes to achieve, and the more difficult accountability is to assign. Next is the normative challenge about the principles (norms) according to which the regime should operate, and how participants' different interests, values and perspectives should be balanced. Inherent in the normative challenge is the question of regime 'rightness and fairness' — or what Levi-Faur, Kariv-Teitelbaum and Medzini refer to as the 'value of justice' challenge.²⁴ And third is the democratic challenge arising from issues of representation — who should be involved in the decision-making, at which level, and how? This is an important challenge. The absence or lack of a voice can lead to the marginalisation of regime participants and other actors critical to the regime's performance and legitimacy. This, in turn, can lead to normative challenges and regulatory failure. And at the global level, there can be added to these challenges, the tensions that arise from nesting private transnational regulatory regimes in public domestic legal structures.

So, how does the regulatory lens — and the concepts of polycentric and hybrid regulatory regimes in particular — assist us to better understand sports' global anti-doping regulatory order and its challenges and tensions? To answer this question, we first need to explain sports' global anti-doping regulatory order.

III Sports' Global Anti-Doping Regime

From the inception of the modern Olympics, doping has represented a threat to the ideals for which it stands — the purity of sport, fairness of competition, and the chivalry of the athlete.²⁵ Beginning in the 1970s, however, the presence of performance-enhancing drugs in Olympic sports had become increasingly obvious. And by the late 1990s, the practice had reached such plague proportions across a number of sports that it threatened sports' integrity and continued popularity.²⁶ Previous attempts to develop a coordinated approach to prevent doping had failed, stymied by what Houlihan et al describe as a 'tangle of competing interests (political, commercial, legal and organisational)'.²⁷ The International Olympic Committee ('IOC'), recognising the problem threatened its legitimacy and hegemony over sport, and that its complexity required a global solution involving all persons with an

²⁴ Levi-Faur, Kariv-Teitelbaum and Medzini (n 18).

²⁵ Ian Ritchie, 'Pierre de Coubertin, Doped "Amateurs" and the "Spirit of Sport": The Role of Mythology in Olympic Anti-Doping Policies' (2014) 31 *The International Journal of the History of Sport* 820.

²⁶ For a history of doping in sport, see Müller (n 1); Yesalis and Bahrke (n 1).

²⁷ Barrie Houlihan et al, 'The World Anti-Doping Agency at 20: Progress and Challenges' (2019) *International Journal of Sport Policy and Politics* 193, 193.

interest in the matter, convened the first World Conference on Doping in Sport in Lausanne, Switzerland, in February 1999, attended by representatives of governments, international sports federations, National Olympic Committees, athletes and various other inter-governmental and non-governmental organisations.²⁸ The Conference produced the *Lausanne Declaration on Doping in Sport*.²⁹ This document provided for the creation of a global anti-doping regulatory regime to tackle the scourge of doping in sport, and for the regime to be operational for the 2000 Sydney Olympic Games.

In this section we examine that regime by reference to the three core regime elements of rule-making, rule-administration and rule-enforcement. First though, we need to introduce WADA — the conductor of the orchestra that is sports' global regulatory regime.³⁰ Established in accordance with the *Lausanne Declaration on Doping in Sport* in November 1999 to promote and coordinate the fight against doping in sport internationally, WADA itself is a hybrid — part public; part private. WADA's Constitutive Instrument of Foundation (its constitution) establishes it as 'an equal partnership between the Olympic Movement and public authorities'.³¹ This equality is reflected in the composition of its Board which is composed in equal parts by representatives from the Olympic Movement and government representatives,³² and its financing.³³ WADA receives half of its budgetary requirements from the IOC, with the other half coming from various national governments.³⁴

A. Rule-Making

One of WADA's main functions is to write the anti-doping rules. These rules comprise the WADA Code, its companion Prohibited List, and

²⁸ Marina Nehme and Catherine Ordway, 'Governance and Anti-Doping: Beyond the Fox and the Hen House' in Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing, 2016) 207, 211–12.

²⁹ *Lausanne Declaration on Doping in Sport*, adopted by the World Conference on Doping in Sport, signed 4 February 1999 (Web Page) <<https://www.wada-ama.org/en/resources/general-anti-doping-information/lausanne-declaration-on-doping-in-sport>>.

³⁰ For an overview of WADA and the operation of the World Anti-Doping Code, see e.g., Paul David, *A Guide to the World Anti-Doping Code: A Fight for the Spirit of Sport* (Cambridge University Press, 2008); Ulrich Haas and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing, 2016).

³¹ World Anti-Doping Agency, *Constitutive Instrument of Foundation of the Agence Mondiale Antidopage — World Anti-Doping Agency* (July 2014) art 7 (Web Page) <<https://www.wada-ama.org/sites/default/files/resources/files/WADA-Revised-Statutes-4-July-2014-EN.pdf>>.

³² *Ibid* art 6.

³³ United Nations Education, Scientific and Cultural Organisation (UNESCO), *International Convention Against Doping in Sport* (19 October 2005) art 15: 'States Parties support the principle of equal funding of the World Anti-Doping Agency's approved annual core budget by public authorities and the Olympic Movement' ('*UNESCO Convention*').

³⁴ World Anti-Doping Agency, *Funding* (Web Page) <<https://www.wada-ama.org/en/funding>>.

associated international instruments.³⁵ The rules are notable for their increasing complexity and breadth. The Code has been amended six times since it was first adopted in 2003, and the Prohibited List is updated annually. The associated international instruments too are updated regularly (nine times in the case of the International Standard for Laboratories), and added to as required (the International Standard for Education and International Standard for Results Management coming into effect for the first time in 2021). This is reflective of the regime's flexibility to evolve, adapt and to increase in complexity in response to changes in its environment.

The WADA Code and its associated instruments have been likened to international agreements which operate in areas such as international trade, that seek to establish uniform practice across a wide range of legal systems by specifying standards, rights and liabilities.³⁶ A detailed examination of the rules is not necessary for the purposes of this article. A high level overview will suffice. The WADA Code imposes obligations on athletes, support persons and officials not to engage in conduct that constitutes an anti-doping rule violation, and upon the IOC, International Paralympic Committee ('IPC'), international and national sport federations, and national anti-doping organisations, to have in place their own anti-doping rules and mechanisms to prevent, detect, investigate and sanction anti-doping rule violations and other breaches of the Code. What is an anti-doping rule violation is defined in Article 2 of the WADA Code. They include: the presence of a prohibited substance in an athlete's body;³⁷ possession, use or attempted use, of a prohibited substance; evading, refusing or failing to submit a biological sample; failing to advise anti-doping control authorities of your whereabouts; complicity or attempted complicity in an anti-doping rule violation; and associating with persons who have committed an anti-doping rule violation. Anti-doping rule violations are strict liability offences, the WADA Code making clear it is not necessary that intent, fault, negligence, or knowing use on the athlete's part be demonstrated to establish an anti-doping rule violation.³⁸

³⁵ *World Anti-Doping Code 2021*, World Anti-Doping Agency (1 January 2021) ('WADA Code'). World Anti-Doping Agency, *WADA Code, International Standard for the Prohibited List (2021), International Standard for Testing and Investigation (2021), International Standard for Laboratories (2021), International Standard for Therapeutic Use Exemptions (2021), International Standard for the Protection of Privacy and Personal Information (2021), International Standard for Code Compliance by Signatories (2021), International Standard for Education (2021), International Standard for Results Management (2021)* (Web Page) <<https://www.wada-ama.org/en/what-we-do/the-code>>.

³⁶ David (n 30) 86–7. Like international trade agreements, the *WADA Code* also is accompanied by published legal opinions that seek to explain the applicability and operation of the Code. See WADA, *Legal Opinions and Articles on the Code* (Web Page) <<https://www.wada-ama.org/en/legal-opinions-and-articles-code>>.

³⁷ A prohibited substance is a substance that appears on the Prohibited List required by Article 4 of the *WADA Code*.

³⁸ *WADA Code* (n 35) art 2.2.1.

Intention is only relevant to sanction, with scope for the sanction to be reduced to zero where there is no fault or negligence.³⁹ But establishing no fault or negligence is an extremely high standard. Notes in the WADA Code state it ‘will only apply in exceptional circumstances’ and give as an example sabotage by a competitor. Conversely, the notes state it would not apply where a prohibited substance is given by the athlete’s doctor, trainer, spouse, coach or other person within the athlete’s circle of associates as athletes are responsible for what they ingest and for the conduct of those to whom they entrust access to their food and drink.⁴⁰

The sanctions that attach to an anti-doping rule violation are set out in Articles 9 to 11 of the Code. They include disqualification of results, the forfeiture of awards and prize money, and suspension from competitions. The length of suspension (ineligibility) varies according to the nature of the violation, and whether it is the first, second or third offence. In the main, the period of ineligibility for first offences ranges from 2 to 4 years depending on the athlete’s level of culpability, which can be doubled for second offences, with the third offence carrying a life-time ban.⁴¹

B. Rule-Administration

WADA’s other main function is to ensure the effective administration and implementation of its rules. The WADA Code positions WADA as the conductor of the global anti-doping regulatory regime. The Code directs WADA to work closely with the IOC, IPC, major event organisers, international and national sport federations, national anti-doping organisations and other signatories to the Code (such as national sporting competitions) to ensure harmonised, coordinated and effective anti-doping programs at the international and national level.⁴² And these other bodies (the orchestra in our analogy) are obliged by the Code to cooperate with WADA (and each other) in the implementation of the Code, to adopt anti-doping rules and policies that conform with the Code, to make compliance with the Code a condition of membership, funding and participation in sporting events and teams they administer or oversee, and to vigorously pursue all anti-doping rule violations within their authority.⁴³

The primary mechanism through which sporting organisations make compliance with the WADA Code a condition of membership and funding is contractual. The IOC, IPC and each international and national sporting federation a signatory to the Code makes compliance with the Code a term and condition of their rules and, through a series

³⁹ Ibid art 10.5.

⁴⁰ Ibid 69–70.

⁴¹ Ibid art 10.9.

⁴² Ibid 9, art 20.7.

⁴³ Ibid art 20.

of cascading contracts, pass that obligation down to their member and affiliate organisations, leagues and clubs, and through them to individual athletes and officials.

While the imposition of WADA rules upon athletes and others involved in the sporting endeavour is a matter of contract (and therefore a private arrangement), its effective administration relies heavily upon the hard coercive power of the state in the form of national anti-doping organisations and laws (and is thus also a public arrangement).⁴⁴ The requirement for nation-states to provide this assistance has been codified in the International Convention Against Doping in Sport, adopted by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 2005.⁴⁵ The UNESCO Convention requires nation-state signatories (of which there are 191, the second most ratified of all UNESCO treaties)⁴⁶ to implement measures to comply with the Code and to support WADA discharge its functions.⁴⁷ As such, the Convention provides the legal framework under which nation-states can act, something the non-governmental WADA Code does not do.

Of particular importance is the Convention's recognition that the fight against doping in sport can only be effective when athletes are tested without notice both in- and out-of-competition, and its requirement that nation-states facilitate and support national testing programs.⁴⁸ Testing of biological samples provided by athletes also is a feature of the Code.⁴⁹ It is identified as the principal mechanism by which rule compliance can be monitored and doping detected and proved,⁵⁰ and the Code's associated instruments specify how testing laboratories should be accredited, testing and sample analysis is to be undertaken, and results indicating an anti-doping rule violation are to be managed and disclosed.⁵¹

In cases where a potential anti-doping rule violation is identified, the Code establishes a process for its resolution in a 'fair, expeditious and efficient manner'.⁵² This process generally begins with the athlete being provisionally suspended pending a hearing of the matter.⁵³ This

⁴⁴ While most national anti-doping agencies are public entities established by the state, some are private non-profit bodies. Examples of the latter are the Canadian Centre for Ethics in Sport and the United States Anti-Doping Agency.

⁴⁵ *UNESCO Convention* (n 33).

⁴⁶ As at 14 June 2021: see UNESCO, *International Convention against Doping in Sport* (Web Page) <<https://en.unesco.org/themes/sport-and-anti-doping/convention>>.

⁴⁷ *UNESCO Convention* (n 33) arts 13–14.

⁴⁸ *Ibid* arts 12, 16.

⁴⁹ *WADA Code* (n 35) arts 5–6.

⁵⁰ *Ibid* arts 3, 5–8.

⁵¹ For copies of the relevant international standards, see WADA, *International Standards* (Web Page) <<https://www.wada-ama.org/en/what-we-do/international-standards#Testing>>.

⁵² *WADA Code* (n 35) art 7. See also arts 8, 13.

⁵³ *Ibid* art 7.

brings us to the next core element of a regulatory regime — rule-enforcement.

C. *Rule-Enforcement*

The specifics of rule-enforcement depend upon the terms and conditions of the contract of the athlete or other person alleged to have committed an anti-doping rule violation, the contract being the principal mechanism by which compliance with the WADA Code is cascaded down to them. Those contracts generally specify the process by which allegations of an anti-doping rule violation are to be heard, determined and, if proved, sanctioned. That process, in turn, must meet the minimum process standards set out in the WADA Code. The WADA Code provides for a two-tiered process. The first tier is a hearing within a reasonable time by a fair, impartial and operationally independent hearing panel in compliance with the WADA International Standard for Results Management.⁵⁴ That panel usually is the sports' internal dispute resolution mechanism. However, in some countries such as Australia and New Zealand, for example, national sports tribunals have been established for that purpose and the WADA Code itself also provides for CAS performing that role for (and with the consent of) international and national level athletes.⁵⁵ The second tier is an appeal from the decision at first instance. In cases arising from participation in an international event or involving international-level athletes, CAS has exclusive jurisdiction.⁵⁶ In other cases, the decision may be appealed to a fair, impartial, and operationally and institutionally independent hearing panel in accordance with rules established by the national anti-doping organisation. However, if no such body is in place and available at the time of the appeal, the athlete or other person can have their appeal heard by CAS.⁵⁷

As can be seen, CAS is central to rule-enforcement. Established by the IOC in 1983, CAS is not (despite the first word in its name) a court of law. Rather, it is a private international arbitration tribunal based in Lausanne, Switzerland. CAS was established to overcome the problem of different national courts reaching inconsistent interpretations of the rules of the IOC and other international sporting organisations. As such, it is an important cog in the efforts of the international sporting community to apply and enforce a uniform set of rules, uniformly.⁵⁸

⁵⁴ Ibid art 8.

⁵⁵ Ibid art 8.5.

⁵⁶ Ibid art 13.2.1.

⁵⁷ Ibid art 13.2.2.

⁵⁸ For an overview of CAS, see, eg, Louise Reilly, 'Introduction to the Court of Arbitration for Sport (CAS) and the Role of National Courts in International Sports Disputes' [2012] 1 *Journal of Dispute Resolution* 63; Matthew Mitten, 'The Court of Arbitration for Sport and its Global Jurisprudence: International Legal Pluralism in a World Without National Boundaries' (2014) 30(1) *Ohio State Journal on Dispute Resolution* 1.

Autonomy, independence and impartiality are central to it successfully discharging this dual role.

CAS, like WADA, is a mix of private and public goals and objectives. CAS is, on the one hand, an arbitral body established to resolve private commercial disputes as an alternative to national courts; and on the other hand, a body designed to resolve sporting disputes that are public in nature.⁵⁹ As such, it is a body that applies private arbitration rules to sporting issues of sometimes great public interest. And while jurisdiction is conferred on CAS by athletes and other persons contractually — it being part of sports' WADA compliant rules to which athletes and other persons must agree to participate in the sporting endeavour — the efficacy of its awards are dependent upon recognition by national laws and enforcement by national courts.⁶⁰ Viewed, in this manner, CAS — and rule-enforcement more broadly — is a hybrid endeavour.

IV Australia's Anti-Doping Regime and the Case of Essendon FC

In this Part, we examine the application of sports' global anti-doping regulatory regime at the national level, using Australia and the case of the Essendon Football Club (Essendon FC) as our case study. This case involved challenges brought by Essendon FC and its coach (James Hird) alleging a joint investigation by the Australian Sports Anti-Doping Authority (ASADA) (Australia's national anti-doping agency) and the Australian Football League (AFL) (administrator of Australia's largest domestic sporting competition in which Essendon FC competed) into a supplement program it conducted was unlawful. The challenges ultimately were unsuccessful.⁶¹ Our interest in the case lies, however, not in the Court's decision and the technical legal arguments before it, but in the light the case shines on the complexities and tensions inherent in hybrid regulatory regimes.⁶² This Part itself is in three sections. First,

⁵⁹ Nick De Marco, 'The Right to a Fair Hearing in Sports' Cases: Lessons from the ECtHR's Decisions in *Mutu & Pechstein*', *LawInSport* (Web Article, 15 October 2018) <<https://www.lawinsport.com/topics/item/the-right-to-a-fair-hearing-in-sports-cases-lessons-from-the-ecthr-s-decision-in-mutu-pechstein>>.

⁶⁰ CAS awards are recognised and enforced by national courts pursuant to the United Nations Commission on International Trade Law (UNCITRAL), *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (10 June 1958) (the "New York Convention"); and in Australia pursuant to the *International Arbitration Act 1974* (Cth). See also *Raguz v Sullivan* (2000) 50 NSWLR 236.

⁶¹ The case was heard at first instance by Middleton J (see *Essendon Football Club v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2014) 227 FCR 1 ('Middleton Judgment')), and on appeal by the Full Court of the Federal Court (see *Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2015) 227 FCR 95 ('Full Court Judgment')).

⁶² The rich discovery in the case made transparent many of the tensions and political pressures brought upon ASADA by the AFL and Federal Government: see, eg, Middleton Judgment (n 61) [159]–[226]; see especially [169]–[179].

Australia's anti-doping regime at the time of the Essendon FC case is explained. Next, the Essendon FC case is examined. And third, reforms introduced after (and partly in response to) the case are discussed — which reforms further increased the regime's hybridity.

A. *Australia's Anti-Doping Regime at the Time of the Essendon FC Case*

At the relevant time (2013), Australia operated under a National Anti-Doping Framework that involved Federal, State and Territory governments working in close cooperation with sporting bodies and professional associations to create, maintain and promote a doping-free culture.⁶³ The government agency with primary responsibility for delivering the Framework was ASADA. ASADA was created by the *Australian Sports Anti-Doping Authority Act 2006* (Cth) ('ASADA Act'). The ASADA Act also provided for the creation of the National Anti-Doping ('NAD') Scheme.⁶⁴ The NAD Scheme implements Australia's obligations under the UNESCO Convention Against Doping in Sport, in particular Article 3(a) that obliges nation-states to adopt appropriate measures consistent with the WADA Code.⁶⁵ And consistent with this obligation, the NAD Scheme is a faithful translation of the WADA Code, Prohibited List and associated instruments into Australia's legal and regulatory environment.

Responsibility for administering the NAD Scheme resides with ASADA. To fulfil this responsibility, the ASADA Act conferred on ASADA (and more specifically upon the Chief Executive Officer (CEO) of ASADA) the legislative authority, functions and powers to implement the Scheme, including to: educate persons on the Scheme and the importance of complying with it; put in place a regime to test athletes for prohibited substances; investigate possible anti-doping rule violations; make findings relating to such investigations; present those findings and its recommendations to the relevant sporting administration body for action; and either at the request of a sporting administration body or on its own initiative, present those findings and consequences at hearings of CAS and other sporting tribunals. One important omission from the ASADA Act and NAD Scheme at the time (prior to 1 August 2013), however, was that neither the ASADA Act nor NAD Scheme conferred on ASADA or its CEO the power to compel a

⁶³ Australian Government, Department of Health, *National Anti-Doping Framework* (Web Page) <<https://www1.health.gov.au/internet/main/publishing.nsf/Content/anti-doping-framework>>.

⁶⁴ *Australian Sports Anti-Doping Authority Act 2006* (Cth) ('ASADA Act'). Section 9 of the ASADA Act provided for the NAD Scheme being prescribed by regulations. The ASADA Regulations 2006 (Cth) subsequently prescribed the Scheme (see Schedule 1).

⁶⁵ NAD Scheme, cl 1.01. The ASADA Act also calls on ASADA to implement 'relevant international anti-doping instruments' that include, in addition to the *UNESCO Convention*, the 1994 Council of Europe Anti-Doping Convention and the International Anti-Doping Arrangement, signed by Australia on 18 April 1996.

person to participate in an investigation, attend an interview or provide information.

Another element of the National Anti-Doping Framework provided that Australian government recognition and funding of national sporting organisations was predicated on those organisations establishing, maintaining and enforcing an anti-doping policy approved by the CEO of ASADA and which was compliant with the WADA Code and the NAD Scheme.⁶⁶ One organisation that sought and obtained approval of its anti-doping policy was the AFL. The AFL reluctantly agreed to be bound by the WADA regime in 2005 after the Federal Government threatened to withdraw funding from it.⁶⁷

The AFL Anti-Doping Code was WADA conforming.⁶⁸ It made it a breach to engage in conduct that constitutes an anti-doping rule violation as defined in the WADA Code (including the WADA Code's rules of strict liability),⁶⁹ incorporated WADA's Prohibited List, testing and other instruments (as amended from time to time),⁷⁰ and applied the sanctions set out in the WADA Code.⁷¹ The AFL Anti-Doping Code provided for sanctions to be determined by the AFL Tribunal at first instance, with appeal rights to the AFL Appeals Board, and final rights of appeal to CAS.⁷² The Code also recognised WADA's right to appeal both a decision of the AFL Tribunal and AFL Appeals Board, and to do so directly to CAS in circumstances where no other party appealed the decision.⁷³ As will be seen, this would prove to be an important and contentious right. Also important was that the AFL Code conferred on the AFL compulsory powers to require players and officials to attend interviews, answer questions and provide any documents — powers ASADA did not have.⁷⁴

The AFL Anti-Doping Code also described the relationship between the AFL and ASADA.⁷⁵ The Code acknowledged ASADA's legislative authority, functions and powers, their application to the AFL, and the AFL's commitment to cooperate with and assist ASADA in their discharge. At the same time, the Code records ASADA's recognition that the AFL retains all functions and powers relating to the issuing of an infraction notice, the convening of hearings and the presentation of

⁶⁶ Sport Australia, *Recognition of National Sporting Organisations* (Web Page) <https://www.sportaus.gov.au/recognition_of_national_sporting_organisations>.

⁶⁷ Chip Le Grand, *The Straight Dope: The Inside Story of Sport's Biggest Drug Scandal* (Melbourne University Press, rev ed, 2016) 31.

⁶⁸ Australian Football League, *Australian Football League Anti-Doping Code* (1 January 2010) ('*AFL Anti-Doping Code 2010*').

⁶⁹ *Ibid* cl 11.

⁷⁰ *Ibid* cls 5-6.

⁷¹ *Ibid* cl 14.

⁷² *Ibid* cl 17.

⁷³ *Ibid* cl 17.1.

⁷⁴ *Ibid* cl 12.7.

⁷⁵ *Ibid* cl 4.

allegations of an anti-doping rule violation at a hearing. In furtherance of this mutual recognition, the AFL undertook to advise ASADA immediately of any possible anti-doping rule violation of which the AFL becomes aware, to share with ASADA information gathered by the AFL in the course of its investigations of any such violation, and to assist, cooperate and liaise with ASADA in relation to any investigations conducted by it; and ASADA undertook to provide regular reports to the AFL on investigations and other conduct undertaken by ASADA relevant to the AFL.

Compliance by clubs, players and officials with the AFL Anti-Doping Code was secured through a range of inter-connected contractual mechanisms. The Standard Player Contract, for example, provides that the player agrees to comply with and observe the AFL's rules and Anti-Doping Code.⁷⁶ Compliance with the AFL's rules and Anti-Doping Code also is a term and condition of both a player's and official's registration with the AFL, and of a club's licence to participate in the AFL competition.⁷⁷ These mechanisms combine to create a contractual obligation upon players, officials and clubs not only to comply with the Code's substantive rules, but also to cooperate with, answer questions from, and produce documents to AFL investigations into suspected breaches of the Code.⁷⁸ And by contracting with the AFL on the terms of the AFL's rules, they also agreed to the AFL sharing with ASADA information gathered in the course of those investigations, and to WADA's appeal rights and CAS's ultimate jurisdiction.

Having explained Australia's anti-doping regulatory regime at the time of the Essendon FC case, let us now look at the case.

B. *The Case of the Essendon FC*

The facts of the Essendon FC case are complex. A detailed explanation of them is not required for the aims of this article. For present purposes, the following facts will suffice.⁷⁹

In August 2001, Essendon FC began a peptide supplements program for its players. The program was administered by a sports scientist (Dr Stephen Dank) who was retained by the Club specifically for this purpose. The program included a range of substances, some of which were administered orally and some by injection. Dank's conduct of the program was not properly supervised by the Club with the result that

⁷⁶ See, eg, AFL-NT Standard Player Contract, cls 7, 10 (Web Page) <<https://www.aflnt.com.au/sites/default/files/AFLNT%20Standard%20Player%20Contract.pdf>>.

⁷⁷ Middleton Judgment (n 61) [53].

⁷⁸ *AFL Anti-Doping Code 2010* (n 68) cl 12.7; Middleton Judgment (n 61) [53]–[58].

⁷⁹ The facts are drawn from the Middleton Judgment (n 61) unless stated otherwise.

proper records of which substances were given to which player either were not kept, or were not available to the Club.

In January 2013, after an investigation by the Australian Crime Commission that unearthed links between organised crime and the supply of performance-enhancing drugs to sporting organisations,⁸⁰ the Club self-reported that its supplements program may have breached anti-doping rules. There then followed a series of investigations including one commissioned by the Club,⁸¹ one commissioned by WorkSafe Victoria (the relevant work health and safety regulator),⁸² and one conducted jointly by ASADA and the AFL (which the lawyer for Essendon FC aptly described as a 'hybrid' investigation).⁸³ It is with respect to the joint (hybrid) ASADA/AFL investigation that we are most interested.

For ASADA, the advantage in conducting a joint investigation was that a joint investigation enabled it to do what it could not otherwise do on its own. While it did not have statutory powers to compel people to appear before it to give evidence or produce documents, the AFL under its contractual arrangements did.⁸⁴ For the AFL, the advantage in conducting a joint investigation was a belief within the AFL that it would better position it to manage the process and its outcomes and, in particular, to bring the matter to a conclusion that protected the integrity of the 2013 season (by resolving the matter before that year's finals) and which minimised the likelihood of sanctions being imposed on the players (by focusing blame on the Club and its governance shortcomings).⁸⁵ Thus, while ASADA and the AFL entered into the joint investigation with the shared overarching mission of detecting and

⁸⁰ Australian Crime Commission, *Organised Crime and Drugs in Sport* (Commonwealth of Australia, 2013) (Web Page) <<https://apo.org.au/sites/default/files/resource-files/2013-02/apo-nid32753.pdf>>.

⁸¹ Ziggy Switskowski, *Report to the Essendon Football Club* (Web Page, 6 May 2013) <<http://www.essendonfc.com.au/news/2013-05-06/dr-ziggy-switskowski-report>>. It described the supplements program as a 'pharmacologically experimental environment' but did not find evidence of doping.

⁸² WorkSafe Victoria's investigation led to it successfully prosecuting Essendon FC for two breaches of the *Occupational Health and Safety Act 2004* (Vic) for failing to provide a safe workplace. The Club pleaded guilty and was fined AUD200,000: WorkSafe Victoria, 'Essendon Football Club', *Prosecution Result Summaries and Enforceable Undertakings* (Web Page) <<https://www.worksafe.vic.gov.au/prosecution-result-summaries-enforceable-undertakings>>. See also Eric Windholz, 'In Charging Essendon, WorkSafe Puts All Sport on Notice', *The Conversation* (Web Page, 10 November 2015) <<https://theconversation.com/in-charging-essendon-worksafe-puts-all-sport-on-notice-50396>>.

⁸³ Middleton Judgment (n 61) [186].

⁸⁴ See above n 74 and accompanying text.

⁸⁵ See Middleton Judgment (n 61) [102]–[119] (section titled 'Assurances to the players'). Le Grand, in his book *The Straight Dope*, recounts a meeting between the AFL, ASADA and a Federal Government advisor in which the AFL outlines its preferred outcome: 'punish the club and any staff responsible but declare the players innocent': Le Grand (n 67) 30. The belief the AFL could manage the outcome also led the Club and players to provide a level of cooperation that might not otherwise have been forthcoming: see Middleton Judgment (n 61) [96], [179], [227], [427].

preventing anti-doping rule violations, there also were differences in purposes and objectives: ASADA was seeking to investigate specific allegations against Essendon FC players, and the AFL was focused on shielding those players and protecting the integrity of its competition and brand.⁸⁶

ASADA released a 400 page interim report on 2 August 2013. Using information from that report the AFL charged Essendon FC with bringing the game into disrepute.⁸⁷ Negotiations between the AFL and Essendon FC then followed, which resulted in Essendon FC accepting the following sanctions: a fine of A\$2 million, being prohibited from playing in that year's finals, the loss of 'draft picks' for two years, and the suspension of their coach (James Hird) for the following season.⁸⁸ This was the 'managed' outcome the AFL had hoped to secure — one that resolved the matter prior to the 2013 final series, that limited disruption of its competition to one season, and did not sanction individual players.

In the meantime, ASADA completed its investigation, concluding there was evidence that Essendon FC players had used a banned substance. ASADA then proceeded to issue 'show cause' notices alleging anti-doping rule violations against 34 current and former players. This was not part of the 'managed' outcome the AFL had sought. This was the point at which the parties went their separate ways. While the investigation was 'joint', the decision-making of the AFL and ASADA was not. Each made separate decisions consistent with their different purposes and objectives: ASADA's purpose of investigating anti-doping rule violations leading to action being taken against individual players upon whom the WADA Code imposes primary responsibility and which the AFL Code adopts and mirrors; and the AFL's purpose to ensure proper governance and implementation of its policies leading to action being taken against the Club and senior officers of the Club.⁸⁹

The issuing of the 'show cause' notices led Essendon FC and its coach to challenge the legality of the joint ASADA/AFL investigation. Specifically, they argued that the joint investigation: (1) was not authorised by ASADA's enabling legislation; (2) was conducted for an improper purpose (namely to take advantage of the AFL's compulsory powers); (3) unlawfully abrogated players' and officials' right not to self-incriminate; and (4) breached statutory disclosure restrictions by

⁸⁶ Middleton Judgment [210], [256(o)].

⁸⁷ Australian Football League Notice of Charge Rule 1.6 (Web Page, 13 August 2013) <<http://images.bigfootymedia.com.s3.amazonaws.com/essendon-charges/EssendonFCnoticeofcharge.pdf>>.

⁸⁸ AFL, *Statement for the AFL Chairman Mike Fitzpatrick: Essendon FC Hearing — 27 August 2013* (Web Page, 27 August 2013) <<https://www.afl.com.au/news/43383/statement-from-afl-chairman-mike-fitzpatrick-essendon-fc-hearing>>.

⁸⁹ Middleton Judgment (n 61) [256(o)–(p)].

disclosing to the AFL confidential information provided by players and officials in interviews.

Essendon FC and Hird were unsuccessful on all counts, with the Court holding that: (1) although ASADA's enabling legislation does not expressly allow for ASADA to conduct a 'joint investigation', it does have power to do things 'convenient' to be done 'in connection with' its investigation, and that cooperating with sports' governing bodies not only is 'convenient' and 'in connection with' the ASADA investigation but an underpinning foundational principle of the global anti-doping regime that ASADA is charged with administering;⁹⁰ (2) ASADA's investigation was conducted for the proper purpose of investigating potential anti-doping rule violations at Essendon FC, and while being able to benefit from the AFL's use of its compulsory powers was a consideration in it seeking to cooperate with the AFL, it was not the purpose of its investigation;⁹¹ (3) players voluntarily participated in the investigation and waived any claims to the privilege against self-incrimination they may have had;⁹² and (4) ASADA did not provide the AFL with confidential information, rather the players and officials who were interviewed voluntarily and simultaneously disclosed information to ASADA and the AFL.⁹³

In dismissing each of the Essendon FC arguments, the Court adopted a strongly purposive approach. Justice Middleton's first instance judgment in particular is notable for the forensic manner with which it analyses both the global and Australian anti-doping regimes and each of their constituent instruments, highlighting their interconnectedness (Australia's regime being an integral part of the global regime), and that one of the foundational principles of the WADA and Australian anti-doping regimes is cooperation between international and national anti-doping organisations on the one hand, and international and national sporting organisations on the other. As such, Middleton's judgment (that the Full Federal Court endorsed) is based on its acceptance of the polycentricity and hybridity that underpins sports' global and Australian anti-doping regulatory regime.

With the court case out of the way, ASADA proceeded to issue infraction notices against 34 past and present Essendon FC players. The alleged anti-doping rule violations were heard by the AFL Tribunal (in

⁹⁰ Ibid [399]–[412], [445]–[465]. The court held that the joint investigation (and the disclosure to the AFL of the Interim Report in particular) was 'for the purposes of' and 'in connection with' the ASADA investigation, there being a strong link between deficient governance and management practices at Essendon FC and the possibility of players being involved in anti-doping rule violations, and assisting the AFL to consider and, if appropriate, take action against Essendon FC and its officials was in 'connection with' the ASADA investigation.

⁹¹ Ibid [418]–[444].

⁹² Ibid [442].

⁹³ Ibid [445]–[465]. The Court also held that the Interim Report prepared by ASADA and provided to the AFL did not include all information gathered by ASADA and, in particular, did not include information that was subject to obligations of confidentiality.

accordance with the AFL Anti-Doping Code) which found the players had not committed anti-doping rule violations.⁹⁴ ASADA chose not to appeal the AFL Tribunal's decision to CAS. However, WADA did, exercising its powers under Clause 17.1 of the AFL Code. This was an act that took many within Australia's sporting community by surprise.⁹⁵ In an award handed down in January 2016, CAS upheld WADA's appeal and suspended the players for two years, being the full minimum sanction for the violation — CAS finding no basis for concluding the players were not at fault and therefore eligible for a sanction reduction.⁹⁶ The suspensions, however, were backdated to 31 March 2015 (the date of the original AFL Tribunal not guilty verdict), and after allowing for the periods of provisional suspension served between the serving of the infraction notices and the AFL Tribunal decision, the players' suspensions ran until November 2016 (which is one entire AFL season) — the very competition and integrity damaging outcome the AFL had sought to avoid.

The final act in the saga was a February 2016 appeal of the CAS award to the Federal Supreme Court in Switzerland in which the players argued that CAS erred in conducting a *de novo* hearing (that is, a full re-hearing of the case) and should only have reviewed the AFL Tribunal's decision for legal error or gross unreasonableness. The Swiss Court rejected the appeal in October 2016, holding that since the players did not formally challenge the jurisdiction of CAS during the arbitration procedure and accepted the application of the CAS Rules (including the rule providing for a *de novo* hearing), they had lost their right to challenge the CAS jurisdiction on appeal.⁹⁷ However, the Court stated that even if the jurisdiction of CAS had been properly challenged by the players, its jurisdiction would have been confirmed and the appeal dismissed.⁹⁸

⁹⁴ AFL Anti-Doping Tribunal, *Full Statement from the AFL's Anti-Doping Tribunal*, (Web Page, 31 March 2015) <<https://www.afl.com.au/news/52500/full-tribunal-statement>>.

⁹⁵ See, eg, Marissa Calligeros, Samantha Lane and Jon Pierik, 'WADA to Appeal Essendon Supplements Verdict', *The Age* (Web Article, 12 May 2015) <<https://www.theage.com.au/sport/afl/wada-to-appeal-essendon-supplements-verdict-20150512-ggzcug.html>>.

⁹⁶ *World Anti-Doping Agency v Bellchambers (Award)* (Court of Arbitration for Sport, Case No 2015/A/4059, 11 January 2016).

⁹⁷ Samantha Lane, 'Essendon Swiss Court decision: Judgment Reveals Appeal Success Not Even "Entertained"', *The Age* (Web Article, 12 October 2016) <<https://www.theage.com.au/sport/afl/essendon-swiss-court-decision-judgment-reveals-appeal-success-not-even-entertained-20161012-gs09lm.html>>.

⁹⁸ *Ibid.* An interesting aside is that the players did not seek an injunction against their suspensions pending resolution by the Swiss Court of their appeal, with the result that had their appeals been successful, they would have still missed the full 2016 season.

C. *Australia's Anti-Doping Regime Post the Essendon FC Case*

Even before ASADA had completed its investigation into the Essendon FC, the Australian Federal Parliament had acted to remedy the glaring omission highlighted by it — namely, ASADA's lack of coercive powers. The *Australian Sports Anti-Doping Amendment Act 2013* (assented to on 29 June 2013, and whose substantive provisions commencing operation on 1 August 2013) conferred on the CEO of ASADA the power to request persons to attend an interview to answer questions, give information, and produce documents or things, if the CEO reasonably believes the person has information, documents or things that may be relevant to the administration of the NAD Scheme.⁹⁹ Failure to comply with such a request exposed the person to a civil (administrative) penalty of 30 penalty units (which at the time equated to AUD5,100).¹⁰⁰ The amendment also preserved the privilege against self-incrimination with respect to answering questions and the giving of information, but not with respect to the production of documents or things.¹⁰¹

Since then there have been three more changes to Australia's anti-doping regime of note. The first change was the creation of the National Sports Tribunal (NST) to hear and resolve national level sporting disputes.¹⁰² The NST (which commenced operations on 20 March 2020 for a two-year trial) has three divisions: an Anti-Doping Division, a General Division, and an Appeals Division. The Anti-Doping Division is authorised to hear anti-doping rule violations at first instance, with the Appeals Division hearing appeals against decisions made either by the NST at first instance or another sporting tribunal. In both cases though, the NST only has jurisdiction if the relevant sports' anti-doping rules permit it, or the parties and the NST agree.

The second substantive change was the creation in July 2020 of Sport Integrity Australia to coordinate a national approach to prevent and address threats to the integrity of Australian sport, and into which ASADA was folded.¹⁰³ This was achieved by renaming the ASADA Act the *Sport Integrity Australia Act*, and by changing 'ASADA' to 'Sport Integrity Australia' and the 'CEO of ASADA' to the 'CEO of Sport Integrity Australia' wherever they appeared in the Act, with the

⁹⁹ *ASADA Act* (n 64) s 13(1)(e).

¹⁰⁰ *Ibid* s 13C. A penalty unit is a debt due to the Federal Government and is enforceable in civil (not criminal) proceedings.

¹⁰¹ *Ibid* s 13D.

¹⁰² *National Sports Tribunal Act 2020* (Cth) (Web Page) <<https://www.nationalsporttribunal.gov.au/>>.

¹⁰³ *Sport Integrity Act 2020* (Cth) s 3A (Web Page) <<https://www.sportintegrity.gov.au/>>.

result that the legislative authority, functions and powers of ASADA and its CEO became those of Sport Integrity Australia and its CEO.¹⁰⁴

And the third substantive change, also in 2020, was: (1) to increase the penalty for failing to comply with a request from the CEO of (now) Sport Integrity Australia to attend an interview to answer questions, give information, or produce a document or thing, from 30 penalty units to 60 penalty units (AUD13,320); and (2) to abrogate the privilege against self-incrimination with respect to answers, information and documents provided in response to such a request in proceedings brought under the (now) *Sport Integrity Australia Act*, *Sport Integrity Australia Regulations* (including the NAD Scheme) and sections 137.1 and 137.2 of the Criminal Code (Cth) that relate to the giving of false or misleading information or documents.¹⁰⁵ Preserving the privilege with respect to other investigations and proceedings is an important concession however, remembering the Essendon FC case had its origins in an investigation into organised crime, and that sports anti-doping regulatory regime exists within a broader regulatory space also occupied by criminal laws targeting drug use, possession and trafficking.

Each of these changes has entrenched and increased the hybridity of sports anti-doping regulatory regime, adding administrative (civil) penalties to contractual penalties, exposing athletes to criminal sanctions without the protection of the privilege against self-incrimination, and engaging the state to resolve anti-doping disputes at the national level. They also have required national sporting bodies to amend their anti-doping policies. The AFL's new Anti-Doping Code, for example, replaces references to ASADA with references to Sport Integrity Australia and provides for anti-doping rule violations to be heard at first instance either by the AFL Tribunal or the NST Anti-Doping Division, and for appeals from their decisions to be heard first by the NST's Appeals Division, and from them to CAS.¹⁰⁶

V The Challenges and Tensions of Polycentricity and Hybridity

In Part 2 we observed that the concept of regulation has expanded — in practice and theory. New forms of polycentric, networked and hybrid governance have emerged. Sports' global anti-doping regime is emblematic of this change. It is polycentric — operating at both the

¹⁰⁴ *Australian Sports Anti-Doping Authority Amendment (Sport Integrity Australia) Act 2020* (Cth).

¹⁰⁵ *Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Act 2020* (Cth).

¹⁰⁶ Australian Football League, *Australian Football Anti-Doping Code*, cls 8.6, 13 (Web Page, 1 January 2021) <<https://resources.afl.com.au/afl/document/2021/03/15/979d17c5-194a-43de-8e07-1eb83fa7edfc/2021-AFL-Anti-Doping-Code.pdf>>.

transnational level and across 191 nations (being the signatories to the UNESCO Convention). It is networked — with WADA, international and national sporting organisations, and national anti-doping agencies, forming a sophisticated web of actors working cooperatively and collaboratively to achieve the collective goal of preventing doping in sport; and it is hybrid — comprising both public and private organisations and employing contractual, administrative and criminal tools in the fight against doping. Sports' anti-doping regulatory regime leverages many of the advantages that comes from polycentricity and hybridity. It brings together different actors' resources, knowledge, skills and expertise, and combines them in a coordinated and complimentary manner. However, sports' global anti-doping regulatory regime is not without its challenges and tensions. It is to how it meets these challenges that the article now turns.

A. *Functional (Effectiveness) Challenge*

It will be recalled that the first challenge identified by Black is functional — how do you coordinate and hold the various actors accountable? On this score, the regime appears to perform well. The anti-doping regime's global organisational infrastructure of WADA, national anti-doping agencies, and CAS is well established and firmly entrenched.¹⁰⁷ WADA in particular has established itself as the lead organisation in global anti-doping efforts and a strong regulatory conductor effectively coordinating individual sports' and nation-states' anti-doping efforts. WADA is the rule-maker, and the other actors (including nation-states) the rule-takers. And WADA has shown itself an effective rule-maker. As previously observed, its rules have evolved in response to changes in its environment. This has enabled the regime to adapt to changes in the broader social, economic, political and legal systems with which it interacts and within which it resides. This combination of flexibility and increased complexity has been an important source of regime stability, simultaneously strengthening the structural coupling of actors and reducing the potential for unilateral action or hostile takeovers.¹⁰⁸

WADA also ensures the proper application and interpretation of its rules, as evidenced by its appealing the AFL Tribunal decision in the Essendon FC case to CAS. In doing so, WADA effectively held both the AFL and ASADA (which it will be recalled did not appeal) to account, illustrating that while nation-states through their national anti-

¹⁰⁷ Houlihan et al (n 27) 195.

¹⁰⁸ Wagner (n 20). Cf Barrie Houlihan and Dag Vidar Hanstad, 'The Effectiveness of the World Anti-Doping Agency: Developing a Framework for Analysis' (2019) 11(2) *International Journal of Sport Policy and Politics* 203 who suggest this complexity and, in particular WADA's expansion into areas such as education and research, have resulted in a lack of momentum and focus.

doping agencies monitor and regulate their national sporting organisations' and athletes' compliance with the rules, their compliance with the rules is monitored and regulated by WADA — making nation-states both regulators and regulatees.

WADA is supported in its leadership role by a number of other regime features. First, there is the incentive of IOC and IPC affiliation and the disincentive of losing it. This arguably is the principal impetus for most international sports and nation-states agreeing to abide by the WADA Code. Without it, they cannot participate in Olympic and Paralympic Games. And both the IOC and IPC have demonstrated a willingness to employ their contractual powers to suspend non-compliant national teams from competing in their competitions, as evidenced by their response to Russian state-sanctioned doping: banning Russian athletes in the case of the IPC, and banning them from competing under their national flag in the case of the IOC.¹⁰⁹ Also important is the UNESCO Convention Against Doping in Sport that gives the WADA-led regime a mandate based in international law, and whose 191 signatories give it moral force. This moral force, in turn, has seen anti-doping become a universal norm that encourages nation-states to apply its principles to domestic sports. The Australian government's policy of making state funding dependent on sports adopting the WADA Code is an example. And CAS also plays an important role, providing WADA with a central forum through which to achieve the consistent interpretation and enforcement of the rules upon which the regime relies for its effectiveness.

However, organisational stability and global commitments do not always translate into effectiveness and efficiency. Here the evidence of success is more equivocal. As noted above, sports' global anti-doping regulatory regime is complex, and this complexity does not come cheap. WADA's 2021 budget is USD42,884,517.¹¹⁰ The combined budgets of national anti-doping agencies would be many times that.¹¹¹

¹⁰⁹ International Paralympic Committee, *The IPC Suspends the Russian Paralympic Committee with Immediate Effect* (Web Page) <<https://www.paralympic.org/news/ipc-suspends-russian-paralympic-committee-immediate-effect>>; International Olympic Committee, *IOC Suspends Russian NOC and Creates a Path for Clean Individual Athletes to Compete in PyeongChang 2018 under the Olympic Flag* (Web Page) <<https://olympics.com/ioc/news/ioc-suspends-russian-noc-and-creates-a-path-for-clean-individual-athletes-to-compete-in-pyeongchang-2018-under-the-olympic-flag>>.

¹¹⁰ WADA, *Contributions to WADA's Budget 2021* (Web Page, 7 June 2021) <https://www.wada-ama.org/sites/default/files/resources/files/wada_contributions_2021_update_en.pdf>.

¹¹¹ For example, Australia's contribution to WADA is USD441,689: *ibid.* The budget for its national anti-doping agency (Sport Integrity Australia) is approximately AUD33,000,000: Commonwealth of Australia, *Portfolio Budget Statements 2021–22: Budget Related Paper No 1.7 — Health Portfolio*, 423–42 (Web Page, 11 May 2021) <<https://www.health.gov.au/sites/default/files/documents/2021/05/budget-2021-22-portfolio-budget-statements-budget-2021-22-health-portfolio-budget-statements.pdf>>.

Yet, doping continues.¹¹² We already have mentioned Russia's systematic doping program.¹¹³ Other examples include Union Cycliste Internationale's protection of Lance Armstrong¹¹⁴, and the failure of countries such as Jamaica, Ukraine and Kenya to put in place effective national anti-doping agencies and testing programs.¹¹⁵ And at the individual level there are hundreds of instances of doping detected every year,¹¹⁶ with the Essendon FC case being one such example. Indeed, it can be argued that the need for WADA to appeal the AFL Tribunal's decision is itself a reflection of some degree of regime ineffectiveness and of an environment in which the sport governing body prioritises its short-term economic and reputational interests over the longer term and broader interests involved in the battle against doping in sport.

What we do not know is the counter-factual — what the sporting world would look like if sports anti-global regime was not in place. Here, we can take some comfort from Houlihan et al's conclusion that the fight against doping in sport today is stronger and more effective than in the 1990s.¹¹⁷ At the same time, however, they also suggest that without WADA's strong central presence 'our attention would be drawn to the large number of stakeholders who are variously apathetic, belligerent or subversive and who far outweigh those that are actively supportive'.¹¹⁸ That sports' hybrid and polycentric global anti-doping regulatory regime is successful and yet so fragile is both a source of comfort and concern.

B. *Normative Challenge*

Reference to 'stakeholders who are variously apathetic, belligerent or subversive' brings us to the next challenge for polycentric regulatory regimes — the normative challenge — and the prospect that not all the actors upon which the regime relies for its effective implementation may share all the norms on which it is based. The concept of 'anti-doping' exhibits all the features of what Pollitt and Hupe refer to as a

¹¹² See, eg, Digital, Culture, Media and Sport Committee, *Combating Doping in Sport* (House of Commons Paper No 366, Session 2017–19) (Web Page) <<https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/366/366.pdf>>.

¹¹³ See above n 109 and accompanying text.

¹¹⁴ Union Cycliste Internationale, Cycling Independent Reform Commission, Report to the President of the UCI (2015).

¹¹⁵ Houlihan et al (n 27) 195. See also Digital, Culture, Media and Sport Committee (n 112).

¹¹⁶ WADA, *2019 Anti-Doping Testing Figures Report* (Web Page, 18 December 2020) <<https://www.wada-ama.org/en/resources/laboratories/anti-doping-testing-figures-report>>.

See also R Ulrich et al, 'Doping in Two Elite Athletics Competitions Assessed by Randomised-Response Surveys' (2018) 48(1) *Sports Medicine* 211 whose research suggests WADA's data seriously underestimates the level of doping.

¹¹⁷ Houlihan et al (n 27) 193, 200. See also Houlihan and Hanstad (n 108) 214.

¹¹⁸ Houlihan et al (n 27) 200.

‘magic concept’.¹¹⁹ Pollitt and Hupe coined the term to describe concepts with strong normative attractiveness that ease the business of governing by providing a vocabulary that spans borders, disciplines and traditional divides, thereby facilitating the forging of coalitions in support of new policy directions. According to Pollitt and Hupe, magic concepts are broad and flexible, with strong positive connotations and a seeming ability to dilute and obscure traditional differences and conflicting interests. It is submitted that the concept of ‘anti-doping’ possesses these attributes. After all, who (apart from the cheaters) do not want drug-free sport? However, Pollitt and Hupe caution that a concept’s magic can be ‘illusory’ — that when one moves from the conceptual to the details of the process and program to deliver the concept, the generality that enabled different groups to interpret the term as favouring positions they advocate becomes a potential source of confusion and conflict when those groups are confronted with the nature and extent of their differences.¹²⁰ We saw this in the Essendon FC case where beneath the shared mission of detecting and preventing anti-doping rule violations, ASADA and the AFL were pursuing different purposes and objectives, with ASADA seeking to investigate specific allegations against Essendon FC players, and the AFL seeking to shield those very players from sanctions to protect the integrity of its competition and brand. That the Essendon FC case is not an isolated example is supported by Houlihan et al’s comments above, and by WADA’s own 2013 review of its progress that similarly concluded:

The primary reasons for the apparent lack of success of the testing programs does not lie with the science involved ... The real problems are the human and political factors. There is no general appetite to undertake the effort and expense of a successful effort to deliver doping-free sport.¹²¹

Sports’ anti-doping regime also has another normative challenge — the question of regime ‘rightness and fairness’ or what Levi-Faur, Kariv-Teitelbaum and Medzini refer to as the ‘value of justice’ challenge.¹²² We have observed that sports’ global anti-doping regime reverses the presumption of innocence, imposes mandatory penalties, infringes upon rights to silence and privacy, imposes collective punishments, and through the monopoly power of sporting organisations confers final jurisdiction upon CAS to the exclusion of national courts.¹²³ This, in turn, has led to criticism that the regime undermines concepts of

¹¹⁹ Christopher Pollitt and Peter Hupe, ‘Talking About Government: The Role of Magic Concepts’ (2011) 13(5) *Public Management Review* 641.

¹²⁰ Ibid 654.

¹²¹ WADA Working Group, *Report to the WADA Executive Committee on Lack of Effectiveness of Testing Programs* (Web Page, 2013) <<https://www.wada-ama.org/sites/default/files/resources/files/2013-05-12-Lack-of-effectiveness-of-testing-WG-Report-Final.pdf>>.

¹²² Levi-Faur, Kariv-Teitelbaum and Medzini (n 18).

¹²³ See above nn 37–40, 106 and accompanying text.

fairness and justice, and that the fundamental civil rights of athletes are being sacrificed in the fight against doping.¹²⁴ That this is the case is not totally surprising, however, given the narrowness of perspectives involved in fashioning its norms and principles. This brings us to the third challenge.

C. *Democratic (Control) Challenge*

We have observed that WADA is set-up as an equal partnership between the IOC and governments.¹²⁵ Athletes, however, have no direct role in the election of its Board. As such there is an inherent democratic deficit. Accountability to athletes is indirect, filtered through international and national sporting federations and governments who have shown themselves willing to compromise athlete rights in the fight against doping. While athletes have a voice at WADA in the form of an Athletes Committee, they are treated as a stakeholder whose views are to be heard, rather than a partner with a seat at the decision-making table.¹²⁶ An example of this was WADA's 2018 decision to end Russia's suspension for state-sponsored doping notwithstanding athlete concerns Russia had not met the benchmarks set by WADA for readmission, and in response to which the athlete representative on WADA's Compliance Review Committee resigned.¹²⁷ Another example is WADA's recently adopted Athletes' Anti-Doping Rights Act which, despite the legal rhetoric of its name, is not a legal document.¹²⁸ Athletes' legal rights remain only those set out in the Code and associated instruments regardless of how they are described in the Act.¹²⁹ Rights listed in the Act not found in the Code and its associated instruments are those 'athletes recommend that anti-doping organizations adopt for best practice',¹³⁰ and as such, are aspirational not mandatory, although their inclusion in the Act should place some (possibly significant) pressure on signatories to the WADA Code to abide by them.

¹²⁴ See, eg, Paul Horvath, 'Anti-Doping and Human Rights in Sport: The Case of the AFL and the WADA Code' (2006) 32 *Monash University Law Review* 357; Andrew Byrnes, 'Human Rights and the Anti-Doping *Lex Sportiva*: The Relationship of Public and Private International Law, "Law Beyond the State" and the Laws of Nation States' in Ulrich Hass and Deborah Healey (eds), *Doping in Sport and the Law* (Hart Publishing, 2016).

¹²⁵ See above nn 28–31 and accompanying text.

¹²⁶ John Gleaves and Ask Vest Christiansen, 'Athletes' perspectives on WADA and the Code: A Review and Analysis' (2019) 11(2) *International Journal of Sport Policy and Politics* 341.

¹²⁷ 'WADA Committee Member Quits in Wake of Russia Recommendation', *New York Times* (Web Page, 15 September 2018) <<https://www.nytimes.com/2018/09/15/sports/wada-beckie-scott-russia-doping.html>>; Tom Morgan, "'Greatest Treachery": Global Fury at WADA Decision to Readmit Russia', *The Sydney Morning Herald* (Web Page, 21 September 2018) <<https://www.smh.com.au/sport/greatest-treachery-global-fury-at-wada-decision-to-readmit-russia-20180921-p5054m.html>>.

¹²⁸ Athletes' Anti-Doping Rights Act (approved by WADA's Executive Committee on 7 November 2019) (Web Page) <https://www.wada-ama.org/sites/default/files/resources/files/athlete_act_en.pdf>.

¹²⁹ Ibid 2.

¹³⁰ Ibid.

The lack of a meaningful athlete voice is compounded by the absence from sports' global anti-doping regulatory order of civil society non-governmental organisations. As such, there is no governance triangle in which civil society bodies act as counter-veiling forces and supervisors of both sports' private actors and public authorities.¹³¹ This is especially problematic in the context of sports' global anti-doping regulatory regime where nation-states share (some might say cede) significant authority and sovereignty over sports matters to private international bodies such as the IOC, WADA and CAS. As Mitten and Opie observe:

... there is an inherent tension between internationalism (ie the need for international sports to operate under a consistent, worldwide legal framework), and nationalism (ie the desire of each nation to preserve its sovereignty and ensure that its athlete citizens are protected by its laws).¹³²

Indeed, the role of nation-states in support of the WADA regime accentuate the challenges faced by athletes. We have seen nation-states introduce administrative and criminal sanctions in support of the fight against doping. The combination of private (contractual) and public (administrative and criminal) sanctions can place athletes and officials in a difficult position, as evidenced by the Essendon FC case. The joint ASADA/AFL investigation saw private contractual obligations employed to fill gaps in (some might say circumvent) a statutory regime that did not confer on state authorities the coercive power to compel testimony and produce documents. It also required athletes and officials to comply with their contractual obligations in the knowledge that doing so could expose them to criminal sanctions — something which eventuated in the case of the Club which was successfully prosecuted for breaches of occupational health and safety laws.¹³³

At the same time, nesting sports' global anti-doping regulatory regime within domestic legal and regulatory structures creates opportunities for clubs and athletes to challenge its local administration. The challenges brought by Essendon FC, its coach and players are one example. Other examples include Claudia Pechstein's (also ultimately unsuccessful) challenge through Munich's Regional Courts arguing recognition of a CAS arbitral award made against her should be refused on the grounds it constituted an abuse by the International Skating Union of its dominant market position and was therefore contrary to

¹³¹ Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 *Vanderbilt Journal of Transnational Law* 501.

¹³² Matthew J Mitten and Hayden Opie, "'Sports Law': Implications for the Development of International, Comparative and National Law and Global Governance' (2010) 85 *Tulane Law Review* 269, 285.

¹³³ See above n 82.

public policy,¹³⁴ and the successful actions brought by Mutu and Pechstein that led the European Court of Human Rights to recognise a right to a public hearing for doping offences.¹³⁵

This is an important and paradoxical feature of the regime's polycentricity and hybridity. It also has enabled some states to extend their anti-doping regime beyond the parameters sanctioned by WADA by including criminal offences and sanctions, further illustrating the tension inherent in the regime's international-national polycentricity. It will be recalled that the Essendon FC supplement case was triggered by a law enforcement investigation into the role of organised crime in the supply of performance-enhancing drugs to sporting organisations. Another example of this is the *Rodchenkov Anti-Doping Act* that gives United States officials the power to prosecute individuals for doping schemes at international sports competitions involving American athletes.¹³⁶ These examples illustrate that while the regime's structural coupling reduces the prospect of unilateral action and hostile take-overs, it does not eliminate them. This has led some commentators to query whether the future of sports anti-doping regime may lie more in the hands of nation-states, than WADA.¹³⁷

VI Conclusion

This article has examined sports' global anti-doping regime through the lens of regulatory theory. Our analysis revealed that sports' global anti-doping regulatory regime is characterised by its polycentricity and hybridity — of different actors (public and private) across multiple sites (national and international) employing a variety of different mechanisms (contractual, administrative and criminal). As such, it is emblematic of regulation's expansion to meet the challenges of globalisation.

We also have seen that sports' global anti-doping regime has proven itself to be functionally stable. It has become an entrenched part of the

¹³⁴ *Pechstein v International Skating Union (Award)* (Court of Arbitration for Sport, Case No 2009/A/1912-1913, 25 November 2009). The arbitral award upheld an International Skating Union Disciplinary Commission decision imposing a two-year ban upon Pechstein for using a prohibited method of blood doping. Refusing an award in circumstances where it is contrary to the public policy of the relevant country is permitted by the New York Convention.

¹³⁵ *Mutu and Pechstein v Switzerland* (European Court of Human Rights, Applications No 40575/10 and No 67474/10, 2 October 2018).

¹³⁶ Michael Pavitt, 'Rodchenkov Claims Doping Act a "Game-Changer" as US Vows to "Aggressively" Enforce', *Inside the Games* (Web Page, 12 April 2021) <<https://www.insidethegames.biz/articles/1106544/rodchenkov-act-gamechanger-anti-doping>>.

¹³⁷ Barrie Houlihan, 'Building an International Regime to Combat Doping in Sport' in R Levermore and A Budd (eds), *Sport and International Relations: An Emerging Relationship* (Routledge, 2004) 62, 74; Slobodan Tomic and Rebecca Schmidt, 'Sports Anti-Doping Bodies Won't Reform Themselves, but Nation-States Can Break the Deadlock', *The Conversation* (Web Page, 24 September 2018) <<https://theconversation.com/sports-anti-doping-bodies-wont-reform-themselves-but-nation-states-can-break-the-deadlock-103636>>.

sporting landscape at both the global and national levels. However, regulatory theory also recognises that polycentric and hybrid regulatory regimes often are highly contested and political in nature.¹³⁸ Their stability reflects agreement among those with power about the trade-offs and balances these regimes inevitably require to be struck. But power dynamics evolve, and we have seen actors not as accepting of the status quo emerge to challenge the status quo. This might reflect the normative challenge has not been fully met. The solution to this might be found in broadening the regime's democratic credentials and giving other stakeholders — and especially athletes — a more meaningful voice in the making, administration and enforcement of the rules that regulate their behaviour. Broadening sports' global anti-doping regime in this manner would not only improve the regime's sense of fairness and justice, it also might improve its effectiveness.

¹³⁸ Black, 'Constructing and Contesting Legitimacy' (n 6).